SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1104.

R. S. SEARL, PLAINTIFF IN ERROR,

vs.

SCHOOL DISTRICT No. 2, IN THE COUNTY OF LAKE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 13, 1889.

1 *Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.*

Be it remembered that heretofore and on, to wit, the 11th day of June, A. D. 1884, came Frank W. Owers, an attorney of said court, and filed in said court a transcript of papers heretofore filed and had in the county court, sitting in and for the county of Lake, in a certain cause in said county court lately pending, wherein School District No. 2, in the county of Lake and State of Colorado, was plaintiff and R. S. Searl was defendant, to wit:

Transcript.

County Court, Lake County.

STATE OF COLORADO, } *ss:*
County of Lake, }

Pleas before the Honorable A. T. Gunnell, judge of the county court within and for the county of Lake, in the State of Colorado, at a term thereof begun and holden, at the court-house, in the city of Leadville, in said county, on the first Monday (it being the — day) of May, A. D. 1884.

Present: Hon. A. T. Gunnell, judge of said court; Peter Becker, sheriff of said county; George D. Talbot, clerk of said court.

2 Be it remembered that on this 2nd day of June, A. D. 1884, the same being one of the regular judicial days of the May term of said court in said year, the following petition was filed in said court in words and figures as follows, to wit:

STATE OF COLORADO, } *ss:*
County of Lake, }

In the County Court in and for said County.

SCHOOL DISTRICT No. 2, in the County of Lake and State of Colorado, Petitioner,
vs.
R. S. SEARL, Defendant.

To the honorable judge of said court:

The above-named petitioner states that long prior to the first day of July, A. D. 1881, it was, from thence hitherto has been, and now is a school district, duly and regularly organized, in the county of Lake and State of Colorado, under and in pursuance of the provisions of chapter 92 of the General Laws of the State of Colorado, entitled "An act to establish and maintain a system of free schools," and of the several amendments thereto; that on said first day of July, A. D. 1881, one Francis M. Watson was in the actual posses-

sion and occupancy, under a deed of conveyance to her, of a certain tract or parcel of land which was then described as lots 14, 15, and 16, in block 18, of the Northeast Addition to the city of Leadville, as shown by a map or plat of said addition on file in the
3 office of the clerk and recorder of said Lake county; that on said day one Timothy S. Schlessinger was in the actual possession and occupancy, under a deed of conveyance to him, of a certain tract or parcel of land which was then described as lots 10, 11, 12, and 13, in block 18, in the addition aforesaid, and as shown by the map or plat aforesaid; that the said Watson and Schlessinger then were and they and their grantors for a long time prior thereto had been in the actual possession and occupancy of said several tracts or parcels of land and respectively claiming the ownership thereof.

That on the said first day of July, A. D. 1881, the board of directors of your petitioner, having been duly authorized and directed so to do, purchased from the said Watson the tract so as aforesaid possessed and occupied by her and received from her a deed of conveyance therefor, and on the same day purchased from said Schlessinger the said tract so as aforesaid possessed and occupied by him and received from him a deed of conveyance therefor; that said several tracts are contiguous and together constitute but one tract or lot of land and together do not exceed one acre; that said deeds of conveyance were executed to and in the name of your petitioner.

That said tracts are situated in said Lake county, within the boundaries of your petitioner, and were purchased as aforesaid for the purpose of a school lot upon which to locate and construct a school-house for the benefit of said school district and the people resident therein.

That on said day, under and by virtue of said purchases and said deed of conveyance, your petitioner entered into the possession and occupation of said land and proceeded to and did con-
4 struct thereon a large, costly, and valuable school-house, and ever since that time has been and now is in the possession and occupancy of said land, using the same for the purposes of school; that after the said purchases and the said entry into possession by your petitioner the territory in which said school lot is embraced was again laid out and surveyed as an addition to said city of Leadville and a map or plat thereof filed in the office of said clerk and recorder, in which said last-named plat or map the land so as aforesaid purchased by and conveyed to your petitioner is described as follows: Lots 812, 814, 816, 818, and the north thirteen and six-tenths (13.6) feet and the east thirty-five (35) feet of lot 810, North Poplar street, and lots 211 and 213, East Ninth street, in Cooper's subdivision of the surface of the Sizer placer, U. S. survey No. 388, and is the same land so as aforesaid purchased and possessed by your petitioner, and that the description last aforesaid is now the true and legal description of said land.

That since the purchase and entry into possession by your petitioner as aforesaid the defendant has acquired the *the* legal title to said land and school lot—the full title to said land and school lot—

the full title to the same having become vested in him on the second day of February, A. D. 1884; that he is now the owner of said property, and that the title thereto acquired by your petitioner by the purchases and conveyances aforesaid has wholly failed; that your petitioner made the purchases, entered into the possession, and constructed the school-house aforesaid in good faith, believing that it had good right so to do; that said school-house is located with reference to the wants and necessities of the people of each portion of said district, and was at the time of said purchases and is now necessary for the school purposes of said district, and that said land and school lot contain no more than is necessary for the location and construction of the school-house aforesaid and the convenient use of the school.

That the compensation to be paid for and in respect of the property aforesaid for the purposes aforesaid cannot be agreed upon by your petitioner and the said defendant, the parties interested, and that the said defendant is a non-resident of the State of Colorado.

That the value of the property in controversy and the amount involved for which relief is sought in this proceeding does not exceed the sum of two thousand dollars.

Wherefore your petitioner prays your honor, the judge of said court, to cause the compensation to be paid by your petitioner to the defendant for and on account of said property used by your petitioner for the purposes aforesaid, to be assessed in accordance with and as by the statute in such cases provided, and for all other necessary and proper relief; and your petitioner will ever pray, &c.

THOMSON & SAYER,
Attorneys for Petitioner.

STATE OF COLORADO, } ss:
County of Lake, }

John H. Heron, being duly sworn, on his oath says that he is the president of the petitioner named in the foregoing petition; that he has heard the same read and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters that he verily believes it to be true.

J. H. HERON.

Subscribed and sworn to before me this 31st day of May, A. D. 1884.

R. A. DAY,
Notary Public.

[NOTARIAL SEAL.]

(Endorsed:) 3756. County court, Lake county. School District No. 2, in the county of Lake, State of Colorado, *vs.* R. S. Searl. Petition. Filed June 2nd, 1884. G. D. Talbot, clerk, by G. W. Vaughn, d'p'ty cl'k. Thomson & Sayer, for petitioner.

And afterwards and on, to wit, the 3rd day of June, A. D. 1884, the same being one of the regular judicial days of the May term of

said court in said year, the following order was had and entered of record in said court in said cause; which order is in words and figures as follows, to wit:

SCHOOL DISTRICT No. 2, in the County of Lake and State of Colorado,
vs.
R. S. SEARL.

Now comes the above-named petitioner, by Thomson and Sayer, its attorneys, and presents to the court its petition, verified by
7 affidavit, and which petition has been duly filed with the clerk of this court, setting forth, among other things, that the petitioner is a school district, in the county of Lake and State of Colorado, regularly organized under the laws of said State; that certain real estate therein described is necessary to be used by it for the purposes and convenience of a school; that the defendant is the owner of said real estate, and praying the judge of this court to cause the compensation to be paid by the petitioner to the defendant for and on account of said property to be assessed. And it appearing from said petition that the defendant is a non-resident of the State of Colorado, it is therefore ordered that a notice addressed to the defendant be published in the Leadville Weekly Herald newspaper, published in said county of Lake, at least four times, which shall be returnable on the 8th day of July, A. D. 1884, and in which shall be stated the name of the petitioner, a full and accurate description of the property sought to be taken and condemned, the purpose for which such condemnation is asked, and the title of the court before which the application for such condemnation is to be heard, and which shall notify the defendant that he is required to appear at the county court room, in the court-house, in the city of Leadville, in said county, on the 8th day of July, A. D. 1884, at which time and place a hearing of said application will be had before this court.

A. T. GUNNELL,
Judge of the County Court of Lake County, Colorado.

(Endorsed:) 3756. County court of Lake county. School District No. 2, in the county of Lake, State of Colorado, *vs.* R. S.
8 Searl. Order of judge. Filed June 3rd, 1884. Geo. D. Talbot, cl'k, by G. W. Vaughn, d'p'ty cl'k.

And afterwards and on, to wit, the 10th day of June, A. D. 1884, the same being one of the regular judicial days of the May term of said court in said year, came the defendant, R. S. Searl, herein, by his attorney, Frank W. Owers, Esq., and filed his petition and bond for the removal of said cause to the United States circuit court, sitting in and for the State of Colorado; which petition and bond are in words and figures as follows, to wit:

STATE OF COLORADO, }
Lake County. }

In the County Court of Lake County.

SCHOOL DISTRICT No. 2, in the County of Lake, State of Colorado, Plaintiff, *vs.* R. S. SEARL, Defendant. } Petition for Removal to the Circuit Court of the United States, District of Colorado.

To said county court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum and value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and the petitioner was at the time of the commence-
9 ment of this suit and still is a citizen of the State of Kansas, and that the plaintiff was then and still is a citizen of the State of Colorado.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of the next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the district of Colorado, at Denver; and he will ever pray.

FRANK W. OWERS,
Attorney for Petitioner.

STATE OF COLORADO, }
Lake County, } *ss:*

I, Frank W. Owers, being duly sworn, do say that I am the attorney for the petitioner in the above-entitled cause; that I reside in Lake county, Colorado; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe; that the reason this affidavit is made by affiant and not by the petitioner is because the said petitioner is absent at this time from the county of Lake and State of Colorado.

FRANK W. OWERS.

10 Subscribed and sworn to in my presence by the said Frank W. Owers before me this 10th day of June, A. D. 1884.

GEORGE D. TALBOT, *Clerk*,
[L. S.] By G. W. VAUGHN, *D'p'ty Cl'k.*

(Endorsed:) 3756. County court. School District No. 2, in Lake county, State of Colorado, *vs.* R. S. Searl. Petition for removal.

Filed June 10th, 1884. G. D. Talbot, clerk, by G. W. Vaughn, d'p'ty cl'k. Frank W. Owers, att'y for def't.

Know all men by these presents that I [we], R. S. Searl, as principal, and A. H. Mallory and Geo. W. Bittenger, as sureties, are he'd and firmly bound unto School District No. 2, in Lake county, State of Colorado, in the penal sum of five hundred dollars; the payment whereof, well and truly to be made unto the said School District No. 2, its heirs, successors, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said R. S. Searl having petitioned the county court of Lake county, State of Colorado, for the removal of a certain cause therein pending, wherein School District No. 2, in Lake county, State of Colorado, is plaintiff and R. S. Searl is defendant, in the circuit court of the United States in and for the district of Colorado, at Denver:

11 Now, if the said R. S. Searl, your petitioner, shall enter in the circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 9th day of June, A. D. 1884.

R. S. SEARL, [SEAL.]
By FRANK W. OWERS, *His Attorney.*
A. H. MALLORY. [SEAL.]
GEORGE W. BITTINGER. [SEAL.]

STATE OF COLORADO, } *ss:*
Lake County, }

George W. Bittinger and A. H. Mallory, of said county, the sureties in the foregoing bond, being duly sworn, each for himself and not one for the other, do depose and say that I am a resident of the State of Colorado and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution of the value of more than five hundred dollars.

A. H. MALLORY.
GEO. W. BITTINGER.

Subscribed in my presence by Geo. W. Bittinger and A. H. Mallory and by each of them sworn to before me this 10th day of June, A. D. 1884.

G. D. TALBOT, *Clerk,*
[L. S.] By G. W. VAUGHN, *D'p'ty Cl'k.*

12 (Endorsed:) 3756. County court. School District No. 2, in Lake county, State of Colorado, *vs.* R. S. Searl. Bond for removal. Filed June 10th, 1884. G. D. Talbot, clerk, by G. W. Vaughn, d'p'ty cl'k. Frank W. Owers, att'y for defendant.

And be it remembered that afterwards and on, to wit, the 10th day of June, A. D. 1884, the same being one of the regular judicial days of the May term of said court in said year, the following proceedings were had and entered of record herein, to wit:

SCHOOL DISTRICT No. 2, in the County of Lake, State of Colorado,
vs.
R. S. SEARL. } 3756.

At this day comes the defendant herein, by his attorney, Frank Owers, and presents to the court his bond and petition for the removal of said cause to the United States circuit court in and for the State of Colorado, and the court, having considered the same, doth order that said bond and petition be accepted and filed, and doth order that said cause be removed to said circuit court upon the payment of the costs herein by said defendant; at [to] which ruling and order of the court the plaintiff, by its counsel, then and there excepts.

A. T. GUNNELL, *Co. Judge.*

13 & 14 STATE OF COLORADO, } *ss:*
County of Lake, }

I, Geo. D. Talbot, clerk of the county court within and for said county of Lake, in the State of Colorado, hereby certify that the above and foregoing is a true and correct transcript and copy of all the papers filed and of all the orders had and entered of record in said court in said cause as the same appears from the records and files of said court in my said office remaining.

Witness my hand and the seal of said county court, at Leadville, Colorado, this 10th day of June, A. D. 1887.

[SEAL.] (Signed) GEO. D. TALBOT, *Cl'k.*

(Endorsed:) No. 1556. Circuit court U. S. School District No. 2, in Lake county, State of Colorado, *vs.* R. S. Searl. Transcript. Filed Jun- 11, 1884. (Signed) Edward F. Bishop, clerk. Frank W. Owers, att'y for def't.

And afterwards and on, to wit, the 23rd day of November, A. D. 1888, came Frank W. Owers, Esq., attorney for respondent, and filed in said court and in said cause a certain stipulation to submit writ of error in Supreme Court under rule XX of said Supreme Court.

And the said stipulation is in words and figures as follows, to wit:

Stipulation.

15 UNITED STATES OF AMERICA, } ss:
District of Colorado,

In the Circuit Court of the United States within and for said District.

SCHOOL DISTRICT No. 2, Lake County, Petitioner, } 1556.
vs.
R. S. SEARL, Respondent. } Condemnation.

It is hereby stipulated and agreed by and between the petitioner, by Blake & Sayer, its attorneys, and the respondent, by Frank W. Owers, his attorney, that any appeal, writ of error, or other proceeding which may be taken or prosecuted to and in the Supreme Court of the United States in this case, or any other, between the above-named petitioner and respondent shall be submitted in said Supreme Court under the provisions of and in accordance with rule twenty (20) of said court. This stipulation is entered into for the purpose of obtaining the earliest possible final decision on all matters of difference between the parties hereto.

(Signed) BLAKE & SAYER,
Attorneys for Petitioner.
" FRANK W. OWERS,
Attorney for Respondent.

Leadville, Nov. 21st, 1888.

(Endorsed:) 1556. In U. S. circuit court. School Dist. No. 2 *vs.* R. S. Searl. Stipulation as to appeals. Filed Nov. 23, 1888.
16 (Signed) William A. Willard, clerk.

And afterwards and on, to wit, the 11th day of January, A. D. 1889, the same being one of the regular juridical days of the November term, A. D. 1888, of said court—present, the Honorable David J. Brewer, circuit judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial.

SCHOOL DISTRICT No. 2, in the County of Lake, } 1556. Petition for
vs.
R. S. SEARL. } Condemnation.

At this day comes the said petitioner, by A. S. Blake, Esq., its attorney, and the said defendant, by F. W. Owers, Esq., his attorney, also comes; and thereupon comes a jury, to wit, Abner T. Woodward, E. C. Moody, Charles W. Pollard, F. H. Allison, Joseph H. Humphrey, F. N. Pierce, and J. S. Deane, seven (7) good and lawful men, and they are duly selected and tried, impaneled and sworn to well and truly try the issue herein joined and a true verdict render

according to the evidence; and said parties accept said jury as sworn & waive all irregularities.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

17 And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause, or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to separate, to meet the court at its next incoming.

And afterwards and on, to wit, the 12th day of January, A. D. 1889, the same being one of the regular juridical days of the November term, A. D. 1888, of said court—present, the Honorable David J. Brewer, circuit judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Verdict.

SCHOOL DISTRICT No. 2, of the County of Lake, *vs.* R. S. SEARL. } 1556. Petition for Condemnation.

At this day come again the said parties, by their attorneys, respectively, and the said jurors, being now all here present and in the jury-box, the hearing of the evidence herein is resumed.

It is agreed and admitted, among other things, that the premises appropriated were necessary for the petitioner and were taken for public use. And the said jurors, having heard the evidence and the facts agreed upon and the instructions of the court, retire to their room, under charge of a sworn bailiff, to consider of their verdict.

18 And afterwards and on this day come again the said jurors and on their oaths do say—first, that the accurate description of the property sought to be condemned in this action is lots 812, 814, 816, 818, and the north 13.6 feet and the east 35 feet of lot 810 North Poplar street, and lots 211 and 213 East Ninth street, in Cooper's subdivision of the surface of the Sizer placer, U. S. survey No. 388, situate in the county of Lake and State of Colorado, together with the improvements thereon; second, that the value of said property at this date is 3,000 dollars.

Wherefore it is considered by the court that the said petitioner, upon the payment of the amount of the said verdict to the said respondent or the deposit of the said amount in this court within thirty days hereafter, shall be, and it hereby is, invested with the fee in and to said premises. And it appearing that the said petitioner is in possession, it is further considered by the court that upon the payment or deposit of the said sum of money within the time aforesaid — to retain possession of and hold the premises aforesaid, with all rights and interests thereto belonging and appertaining.

It is further considered by the court that the said petitioner pay the costs of this proceeding, to be taxed.

And thereupon, on motion of the said petitioner, day until ninety days from this day is allowed the said petitioner within which *time* to file his bill of the exceptions reserved by him upon the trial of the issues herein joined, and bond upon writ of error is fixed at two hundred and fifty dollars ($250.00).

19 And afterwards and on, to wit, the 15th day of January, A. D. 1889, came again the said defendant, by his attorney aforesaid, and filed in said court and in said cause his bill of the exceptions reserved by him upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States for the District of Colorado.

SCHOOL DISTRICT No. 2, of Lake County, in the State of Colorado, Petitioner,
vs.
R. E. SEARL, Respondent.

Be it remembered that heretofore, to wit, on the 11th day of January, A. D. 1889, the same being one of the regular juridical days of the January term, 1889, of said court, the said cause coming on for hearing and trial before the Honorable David J. Brewer, circuit judge, and a jury, the following proceedings were had, to wit:

The said parties, by their respective attorneys, offered the following stipulation in writing, signed by them, respectively, and which is in words and figures as follows, to wit:

20 STATE OF COLORADO, *District of Colorado,* } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

SCHOOL DISTRICT No. 2, in the County of Lake and State of Colorado, Petitioner,
vs.
R. S. SEARLE, Respondent.
} Stipulation.

Proceedings under the eminent domain act by district school board.

For the purposes of the present hearing and trial only of the above-entitled action or proceeding, either in this court, where it is now pending, or in the Supreme Court of the United States, where

it may be taken on appeal or writ of error, the following facts are agreed upon by and between the respective parties hereto, to wit:

First. That a receiver's receipt was issued for the Sizer placer, United States survey No. 388, on the 16th day of April, A. D. 1881, out of the district land office of the United States at the city of Leadville, in the State of Colorado, to one Isaac Cooper, claimant.

Second. That on the 18th day of May, A. D. 1880, a United States patent was issued to the said Isaac Cooper for the said Sizer placer.

Third. That the lands sought to be condemned in the present proceeding is a part of the said Sizer placer.

Fourth. That since the 20th day of November, A. D. 1882,
21 and before the institution of this proceeding, the said Isaac Cooper conveyed to the said R. S. Searle the said Sizer placer, and the said Searl by virtue thereof is now the owner and holder of the said patent title thereto.

Fifth. That prior to the application for patent to the said Sizer placer, and up to the time when the said school board purchased the same and took possession thereof, the land herein sought to be condemned was occupied, possessed, and improved and the ownership thereof claimed by persons holding under what was called and known as a "squatter title."

Sixth. That on or about the first day of July, A. D. 1881, the said school board purchased and took conveyances of the land now sought to be condemned, with the buildings and improvements thereon, made and erected by the said squatter occupants, from said occupants, and paid therefor the sum of thirty-five hundred ($3,500) dollars.

Seventh. That on or before the thirtieth day of July, A. D. 1881, the said school board went into actual possession of the lots described in the petition herein, and immediately commenced to build, and on the thirtieth day of January, A. D. 1882, prior to the institution of these proceedings, completed improvements suitable and appropriate for educational purposes at a cost to the said school district of forty thousand ($40,000) dollars; which property it has since possessed and occupied and still occupies for school purposes.

Eighth. That at the time of the commencement of this action and the institution of these proceedings in condemnation the land described in the petition herein, together with the improvements thereon so made by the school board as aforesaid, was of the value of forty thousand ($40,000) dollars.

22 Ninth. That at the said times of taking possession and at the time of the commencement of this action and the institution of these proceedings in condemnation the land described in the petition herein, without the improvements thereon made by the school board, was of the value of three thousand ($3,000) dollars, and that the area of same is less than one acre.

Tenth. That petitioner had knowledge of the issuance of a U. S. patent, covering the property sought to be condemned, prior to the purchase of the title which it subsequently purchased, and which was known as the squatter title.

That prior to such purchase petitioner employed and paid reputa-

ble counsel to investigate said title; that the counsel so employed reported in favor of the validity of the so-called squatter title and against the validity of the U. S. patent; that, believing said so-called squatter title to be better than the title conveyed by U. S. patent, petitioner purchased the same; that after said purchase petitioner subscribed to the funds of an association organized for the purpose of endeavoring to defeat said patent title.

Eleventh. That prior to the commencement of and during the erection of the school building now standing on the land sought to be condemned the board of school directors of petitioner was notified on behalf of respondent, who at that time owned an equitable interest in the said property, and on behalf of respondent's grantors, that any building said school district might erect on said lots would be erected at the peril of the said school district, and would be claimed, when completed, by said respondent and his grantor; but the said school district, having purchased the said lots of the squat-
23 ters in possession as aforesaid and believing that it had the better title thereto, proceeded, notwithstanding such notice, and made and erected said improvements as aforesaid.

And in view of the statute, Dawson's Colorado Code, p. 80, sec. 253, and for the purpose of putting as speedy an end to contention as possible, it is further stipulated that the foregoing values may be taken as the actual values at the time of the trial of this suit, and that the property sought to be condemned is for public use, and within the meaning of the law is necessary for the school district.

Twelfth. That R. S. Searl is now and was at the time of the commencement of these proceedings a citizen and resident of the State of Kansas.

(Signed) BLAKE & SAYER,
Attorneys for Petitioner.

(Signed) FRANK W. OWERS,
Attorney for Respondent.

And the said defendant, R. E. Searl, introduced further evidence tending to show that he became the legal owner of the premises on the 2nd day of February, 1884, and commenced his action of ejectment on the 24th of March, 1884, which was at issue and set for trial in this court on the 11th day of June, 1884; that petitioner filed bill for injunction and obtained writ of injunction restraining trial of ejectment suit on the 7th of June, 1884, and commenced these proceedings on the 9th of June, 1884.

And thereupon, after argument of counsel, the respondent made the following requests for instructions to the jury; which
24 requests and each of them were refused, and to which refusal of the court so to give said instructions the respondent then and there excepted.

Instructions to the Jury Prayed by the Respondent.

I. GENTLEMEN OF THE JURY: You are instructed that under the admitted facts of the evidence before you, concerning which there is

no conflict, the respondent is entitled to a verdict from you to the effect that the value of the property sought to be condemned is forty thousand dollars.

II. You are instructed that under the law it is your duty to render a verdict in favor of respondent for the value of the property sought to be condemned, together with the buildings, as you may ascertain it to be at the date of the trial of this cause.

III. You are instructed that the acts of the petitioner in taking possession of the property of respondent, which it now seeks to condemn, and erecting buildings and improvements thereon were acts of trespass, and that the buildings and improvements erected during such possession by petitioner became, were, and are the property of respondent.

IV. You are instructed that one who knows the condition of the title and who, against the protest of the legal owner, without right or authority makes improvements on the lands of another loses those improvements, and they become the property of the owner of the land.

V. You are instructed that a school district possesses only the same rights with regard to the exercise of its powers of eminent domain as any other individual or corporation having the power to condemn; and petitioner is not entitled — and should not receive at your hands any more sympathy because it is a school district that [than] it would receive were it a railroad corporation or any other person.

VI. You are instructed that there is no warrant or authority in the constitution or laws of this State which empowers any corporation having the right to condemn property for public use to first take possession of the real estate of another and afterward make that taking legal and rightful by having the damages assessed with reference to the time when such wrongful possession was taken.

VII. You are instructed that if you believe that the purchase by petitioner of the so-called "squatter title" was made with full knowledge on the part of the petitioner of the outstanding patent title, then such purchase did not and does not operate to clothe petitioner with such color of title as would enable it to claim such improvements as its own property in a subsequent proceeding to condemn the land upon which they stand.

VIII. You are instructed that if you believe from the evidence that the petitioner erected the buildings and made the improvements on the property now sought to be condemned with full knowledge of the existence of respondent's title and against the protests of the respondent and Cooper, the then holder of the legal title, then the petitioner is estopped from claiming that the improvements were made in good faith and under color of title.

IX. You are instructed that petitioner erected the buildings and made the improvements upon and took possession of the property sought to be condemned without right or legal authority, and that such acts did not change or impair the rights of the respondent in the land.

X. You are instructed that at the time of the taking pos-
26 session by petitioner of the property now sought to be condemned and the erection of the buildings thereon petitioner had not the legal power to condemn the property for its use, and was not empowered to condemn until the month of February, A D. 1883.

And thereupon the court instructed the jury as follows:

It appears that in April, 1881, a receiver's receipt was issued for a placer claim, and on the 18th of May, 1881, a patent was issued, and on the first day of July, 1881, the school board purchased from certain occupants of these premises this ground and paid $3,500 for it. It acted under the advice of counsel in favor of the occupants and against the placer title. That the land (less than an acre) was then worth $3,000. The board has since erected a $40,000 schoolhouse on the property.

We all know that that which gives value to land in a city is not the efforts of any one man; that it is the aggregation of the efforts of many citizens. The Government in the spring of 1881 sells this placer ground for $2.50 an acre. In the same year an acre of that ground is worth $3,000—made so not by the efforts of this present owner, but by the efforts and toil of the public. He has obtained from the public, represented by the Government, land for which he pays $2.50. The efforts of a small portion of the public have made that land worth $3,000, and the same public has taxed itself to put $40,000 worth of improvements upon it; and then, because the legal title is put into his hands, he wants the public, which has thus made the land worth $3,000, and thus paid for $40,000 worth of improvements upon it, to pay him that full sum, $40,000. There is not one shadow of equity in it. Counsel says that this claimant is
27 hurt by the conduct of the school district, so that he feels like insisting upon his "pound of flesh." Well, all I can say is that this court is the poorest place on the continent for the "pound-of-flesh" transactions, and if there was not a precedent or authority for such a ruling I would make one in this case. I never would put myself on record as saying that a man under the circumstances could compel the public to pay $40,000. If there is any law for such a claim somebody else has to affirm it before it can be allowed here.

These various instructions will all be refused, except the last, which I presume is in accordance with the language of the statute.

"Gentlemen of the jury, you are instructed that the form of your verdict will be as follows: 'We, the jury, find—first, that the accurate description of the property sought to be condemned in this action is lots 812, 814, 816, 818, and the north 13.6 feet and the east 35 feet of lot 810 North Poplar street, and lots 211 and 213 East 9th street, in Cooper's subdivision of the surface of the Sizer placer, U. S. survey No. 388, situate in the county of Lake and State of Colorado, together with the improvements thereon.'

"Second. That the value of said property at this date is $3,000."

To the giving of which instruction and the refusal to give those prayed by the respondent the respondent, by counsel, then and there excepted.

And thereupon the jury returned a verdict, in accordance with the instructions of the said court, in the sum of $3,000.

And forasmuch as the matters above set forth do not fully appear of record the defendant tenders this his bill of exceptions and prays that the same may be signed and sealed by
28 the judge of this court pursuant to law; which is done accordingly this the 14th day of January, A. D. 1889.

(Signed) DAVID J. BREWER,
Circuit Judge.

(Endorsed:) 1556. In circuit court of U. S., dist. of Col. School District No. 2, of Lake Co., petitioner, *vs.* R. S. Searl, resp't. Bill of exceptions. Filed Jan. 15, 1889. (Signed) William A. Willard, clerk.

And afterwards and on, to wit, the 1st day of February, A. D. 1889, came again the said respondent, by his attorney aforesaid, and filed in said court and in said cause his assignment of errors.

And said assignment of errors is in the words and figures as follows, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States within and for said District.

29 SCHOOL DISTRICT NO. 2, Petitioner and Defendant in Error,
vs.
R. S. SEARL, Respondent and Plaintiff in Error.

Plaintiff in error comes and says that in the record of the proceedings of this cause there is manifest error, to wit:

First. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "Gentlemen of the jury: You are instructed that under the admitted facts of the evidence before you, concerning which there is no conflict, that the respondent is entitled to a verdict from you to the effect that the value of the property sought to be condemned is forty thousand dollars."

Second. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "You are instructed that under the law it is your duty to render a verdict in favor of respondent for the value of the property sought to be condemned, together with the buildings, as you may ascertain it to be at the date of the trial of this cause."

Third. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "You are instructed that the acts of the petitioner in taking possession of the property of respondent, which it now seeks to condemn, and erecting buildings and improvements thereon

were acts of trespass, and that the buildings and improvements erected during such possession by petitioner became, were, and are the property of respondent.

30 Fourth. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "You are instructed that one who knows the condition of the title and who, against the protest of the legal owner, without right or authority, makes improvements on the lands of another loses those improvements, and they become the property of the owner of the land."

Fifth. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "You are instructed that a school district possesses only the same rights with regard to the exercise of its powers of eminent domain as any other individual or corporation having the power to condemn, and petitioner is not entitled to and should not receive at your hands any more sympathy because it is a school district than it would receive were it a railroad corporation or other person."

Sixth. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "You are instructed that there is no warrant or authority in the constitution or laws of this State which empowers any corporation having the right to condemn property for public use to first take possession of the real estate of another and afterward make that taking legal and rightful by having the damages assessed with reference to the time when such wrongful possession was taken."

Seventh. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "You are instructed that if you believe that

31 the purchase by petitioner of the so-called 'squatter title' was made with full knowledge on the part of the petitioner of the outstanding patent title, then such purchase did not and does not operate to clothe petitioner with such color of title as would enable it to claim such improvements as its own property in subsequent proceeding to condemn the land upon which they stand."

Eighth. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "You are instructed that if you believe from the evidence that petitioner erected the buildings and made the improvements on the property now sought to be condemned with full knowledge of the existence of respondent's title and against the protests of the respondent and Cooper, the then holder of the legal title, then petitioner is estopped from claiming that the improvements were made in good faith and under color of title."

Ninth. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "You are instructed that petitioner erected the buildings and made the improvements upon and took possession of of the property sought to be condemned without right or legal au-

thority, and that such acts did not change or impair the rights of the respondent in the land."

Tenth. The court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit: "You are instructed that at the time of the taking of possession by petitioner of the property now sought to be condemned and the erection of the buildings thereon petitioner had not the legal power to condemn property for its use and was not empowered to condemn until the month of February, A. D. 1883."

32 Eleventh. The court below erred in instructing the jury of its own motion as follows: "It appears that in April, 1881, a receiver's receipt was issued for a placer claim, and on the 18th of May, 1881, a patent was issued, and on the 1st day of July, 1881, the school board purchased from certain occupants of these premises this ground and paid $3,500 for it; that the land (less than an acre) was then worth $3,000."

Twelfth. The court below erred in instructing the jury of its own motion as follows: "We all know that that which gives value to land in a city is not the efforts of any one man; that it is the aggregation and the efforts of many citizens. The Government in the spring of 1881 sells this placer claim for $2.50 an acre—I believe that is the price. In the same year an acre of that ground is worth $3,000, made so not by the efforts of this present owner, but by the efforts and toil of the public, represented by the Government, land for which he pays $2.50, and the efforts of a small portion of the public have made that land worth $3,000, and that same public has taxed itself to put $40,000 worth of improvements upon it, to pay him for that full sum, $40,000. There is not one shadow of equity in it. Counsel says that this claimant is hurt by the conduct of the school district, so that he feels like insisting upon his pound of flesh. Well, all I can say is that this court is the poorest place on the continent for any man insisting upon a pound of flesh, and if there was not a precedent or authority that justified such a ruling I would make one in this case. I never would put myself on record as saying that a man under the circumstances could compel the public to pay $40,000 for land on which they, under the circumstances,

33 which they did in this case, could, under the advice of counsel, mistaken though it seems to be, pay the man holding possession and who delivered possession to them the sum of $3,500. If there is any equity in such a claim somebody else has got to sanction that before it can be allowed here."

Thirteenth. The court below erred in instructing the jury of its own motion as follows: "You are instructed that the form of your verdict shall be as follows: We, the jury, find—

"1st. That the accurate description of the property sought to be condemned in this action is lots 812, 814, 816, 818, and the north thirteen and six-tenths (13.6) feet, and the east thirty-five (35) feet of lot 810 North Poplar street, and lots 211 and 213 East Ninth street, in Cooper's subdivision of the surface of the Sizer placer, U. S. survey No. 388, situate in the county of Lake and State of Colorado, together with the improvements thereon.

"2nd. That the value of said property at this date is $3,000."

Fourteenth. The court below erred in rendering judgment.

Wherefore and by reason of said errors the plaintiff in error prays that the said judgment may be wholly set aside, reversed, annulled, and for naught held, and that the said plaintiff in error may be restored to its right in the premises in every manner and respect as though the said judgment had not been rendered.

(Signed) SAM. P. ROSE,
" FRANK W. OWERS,
Att'ys for Pl'ff in Error.

(Endorsed:) 1556. In U. S. circuit court, dist. of Colorado. School Dist. No. 2, Lake county, *vs.* R. S. Searl. Condemna-
34 tion. Assignment of errors. Filed Feb. 1, 1889. (Signed) William A. Willard, clerk. Sam. P. Rose, F. W. Owers, for Searl.

And afterwards and on, to wit, the 2nd day of February, A. D. 1889, came again the said respondent, by his attorney aforesaid, and filed in said court and in said cause his bond and sued out of said court a writ of error and citation to the Supreme Court of the United States; and the said bond is in words and figures as follows, to wit:

Bond.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that —— ——, as principal, and —— —— —— ——, as sureties, are held and firmly bound unto School District No. 2, in the county of Lake and State of Colorado, in the full and just sum of two hundred & fifty (250) dollars, to be paid to the said School District No. 2, in the county of Lake and State of Colorado; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the November term, A. D. 1888, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between School District No. 2, in the
35 county of Lake and State of Colorado, petitioner, and R. S. Searl, respondent, judgment was rendered against the said respondent; and the said R. S. Searl having obtained a writ of error to reverse the judgment of the said court & having filed a copy thereof in the office of the clerk of said court, and a citation directed to the said School District No. 2, in the county of Lake & State of Colorado, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October, A. D. 1889, next:

Now, the condition of the above obligation is such that if the said R. S. Searl shall prosecute said writ of error to effect and answe

all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) R. S. SEARL. [SEAL.]
" A. D. SEARL. [SEAL.]
" A. H. MALLORY. [SEAL.]

Approved Feb'y 2d, 1889.
(Signed) MOSES HALLETT, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

A. D. Searl and A. H. Mallory sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in unencumbered real estate in Colorado the sum below set opposite
36 his name—that is to say, as to A. D. Searl, one thousand dollars, as to A. H. Mallory one thousand dollars—over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

(Signed) A. D. SEARL.
" A. H. MALLORY.

Subscribed and sworn to before me this 26th day of January, A. D. 1889.

(Signed) ALONZO WALKER,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) Gen. No. 1556. Circuit court of the United States, district of Colorado. School District No. 2, Lake county, petitioner, *vs.* R. S. Searl, respondent. Bond on writ of error, $250.00. Filed this 2d day of Feb'y, A. D. 1889. (Signed) William A. Willard, clerk, by F. W. Tupper, deputy clerk.

And the said writ of error, with the return of the clerk thereto, is next hereto attached, to wit:

Writ of Error.

37 Writ of Error to — Court U. S., District of Colorado.

THE UNITED STATES OF AMERICA.

[Coat of arms.]

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of

the judgment of a plea which is in the said circuit court, between R. S. Searl and School District No. 2, in the county of Lake, a manifest error hath happened, to the great damage of the said R. S. Searl, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said term of said court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2d day of February, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 113 year.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
MOSES HALLETT, *Judge*.

37½ [Endorsed:] Gen. No. 1556. Circuit court of the United States, district of Colorado. R. S. Searl, plaintiff in error, *vs.* School Dist. No. 2, in the county of Lake. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 4th day of February, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. F. W. Owers, attorney for plaintiff in error.

Received copy of above writ this 4th day of February, A. D. 1889.

BLAKE & SAYER,
Att'ys for Def'ts in Error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States, at Washington, D. C., a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, except the order remanding to the county court of Lake county, which has been reversed by the supreme court.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 5th day of February, A. D. 1889.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

38 And the said citation is next hereto attached, to wit:

Citation.

39 Citation — U. S. Circuit Court.

[Coat of arms.]

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to School District No. 2, in the county of Lake, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington on — the day of —— next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein R. S. Searl is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ or error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 2nd day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

MOSES HALLETT, *Judge*.

40 [Endorsed:] Gen. No. 1556. Circuit court of the United States, district of Colorado. R. S. Searl, plaintiff in error, *vs.* School Dist. No. 2, in the county of Lake, defendant in error. Citation. Filed in circuit court of the U. S. this 4th day of February, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. F. W. Owers, attorney for plaintiff in error.

We hereby accept service of copy of this citation this 4th day of February, A. D. 1889.

BLAKE & SAYER,
Att'ys for Defendant in Error.

41 [Coat of arms.]

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby cer-

tify the above and foregoing to be a true, perfect, and complete transcript and copy of transcript, stipulation, bill of exceptions, assignment of errors, bond, and all orders of court, except the order remanding to the county court of Lake county, which has been reversed by the supreme court, heretofore filed or entered of record in said court and in a certain cause lately in said court pending, wherein School District No. 2, in the county of Lake and State of Colorado, was plaintiff and R. S. Searl was defendant, as fully and completely as the same still remain on file and of record in my office.

Seal United States Circuit Court, District of Colorado.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this fifth day of February, A. D. 1889.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Endorsed on cover: Colorado C. C. U. S. No. 1104. R. S. Searl, plaintiff in error, *vs.* School District No. 2, in the county of Lake. Filed March 5, 1889.

In the Supreme Court

Of the United States.

OCTOBER TERM, A. D. 1889.

R. S. SEARL,
Plaintiff in Error,
vs.
SCHOOL DISTRICT NO. 2, IN THE COUNTY OF LAKE,
Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is a suit in condemnation brought by defendant in error to obtain title under eminent domain to a portion of the Sizer placer in Lake county, Colorado, owned by plaintiff in error.

The case was tried on a stipulation as to facts (page 10 of record) which shows:

That on the 16th day of April, A. D. 1881, Isaac Cooper entered and paid for the Sizer placer at the district land office of the United States at Leadville, Colorado, and received a Receiver's receipt for the same. On the 18th day of May, A. D. 1881 (an error on page 11 of record fixes the year as 1880), a United States patent was issued to Cooper for the placer. That at that time the Sizer placer, as well as the Starr placer and other surrounding

ground, had been and was claimed by persons holding under what was called and known as squatter title. The condition of affairs thereon being exactly such as is described in Steel vs. Smelting Company, 106 U. S. 447, which case was decided adversely to such squatter titles.

About the 1st day of July, A. D. 1881, and after the issuance of such patent, the defendant in error purchased for $3,500 the so-called squatter title to the premises sought to be condemned in this action, from the squatters, or parties in possession, and about the 30th day of July, A. D. 1881, against the protest of said Cooper and plaintiff in error, who, at that time, claimed an equitable interest in the property, defendant in error entered into possession of said premises and immediately commenced the erection of a large bui ding on said premises.

That prior to the purchase of said squatter title, and the commencement of said building, defendant in error had full, entire and complete knowledge of the condition of the title to said premises, and of the issuance of U. S. patent for the same to said Cooper, and of said Cooper's claim to own said property, and of the interest of plaintiff in error therein, and was duly notified by said Cooper and plaintiff in error that any building which it might place thereon would be erected at its peril, and would, when erected, be claimed by said Cooper and plaintiff in error as their property.

That before the institution of this procceding in condemnation plaintiff in error became and was, at the date of the commencement thereof, the sole owner of the legal title to the premises sought to be condemned.

That at the date of the commencement of this proceeding and of the trial of this cause, the premises, together with the improvements, were of the value of forty thousand dollars, and the value of the land without the improvements, was three thousand dollars.

At the trial, besides the stipulation as to facts, plaintiff in error introduced uncontradicted record evidence to show that he became the legal owner of the premises in controversy on the 2d day of February, A. D. 1884, and commenced his action of ejectment on the 24th day of March, A. D. 1884, which was at issue and set for trial in the U. S. Circuit Court for the District of Colorado, on the 11th day of June, A. D. 1884, when defendant in error filed a bill or and obtained an injunction restraining the prosecution of the

ejectment suit pending the proceedings in condemnation which it had commenced on the 9th day of June, A. D. 1884, in the County Court of Lake county, Colorado.

The cause was removed by plaintiff in error to the United States Circuit Court for the District of Colorado, and by it remanded to the State Court for alleged want of jurisdiction. The order remanding was appealed from, the writ of error sued out to this Honorable Court, which decided (124 U. S. 197) that the order remanding was improperly made, and directed the lower Court to take jurisdiction. The case is now again before this Court after trial under such direction.

SPECIFICATIONS OF ERRORS.

Among the errors assigned by the plaintiff in error and which are relied upon by him, are errors committed by the Court below in refusing to give certain instructions asked for by plaintiff in error, and in the giving of certain other instructions and directing the finding of the verdict rendered, and in entering judgment thereunder, and are here set forth.

1. Because the Court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit:

"You are instructed that one who knows the condition of the title, and who, against the protest of the legal owner, without right or authority, makes improvements on the lands of another, loses those improvements, and they become the property of the owner of the land."

2. Because the court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit:

"You are instructed that the acts of the petitioner in taking possession of the property of respondent, which it now seeks to condemn, and erecting buildings and improvements thereon were acts of trespass, and that the buildings and improvements erected during such possession by petitioner became, were and are the property of respondent."

3. Because the court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit:

"You are instructed that if you believe that the purchase by petitioner of the so-called 'squatter title' was made with full knowledge on the part of the petitioner of the outstanding patent title, then such purchase did not and does not operate to clothe

petitioner with such color of title as would enable it to claim such improvements as its own property in subsequent proceeding to condemn the land upon which they stand."

4. Because the court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit:

"You are instructed that petitioner erected the buildings and made the improvements upon and took possession of the property sought to be condemned without right or legal authority, and that such acts did not change or impair the rights of the respondent in the land."

5. Because the court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit:

"You are instructed that if you believe from the evidence that petitioner erected the buildings and made the improvements on the property now sought to be condemned with full knowledge of the existence of respondent's title and against the protests of the respondent and Cooper, the then holder of the legal title, then petitioner is estopped from claiming that the improvements were made in good faith and under color of title."

6. Because the court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit:

"You are instructed that a school district poossesses only the same rights with regard to the exercise of its powers of eminent domain as any other individual or corporation having the power to condemn, and petitioner is not entitled to and should not receive at your hands any more sympathy because it is a school district than it would receive were it a railroad corporation or other person."

7. Because the court below erred in refusing to give to the jury the following instruction, asked on behalf of respondent and plaintiff in error, to wit:

"You are instructed that there is no warrant or authority in the constitution or laws of this state which empowers any corporation having the right to condemn property for public use to first take possession of the real estate of another and afterward make that taking legal and rightful by having the damages assessed with reference to the time when such wrongful possession was taken."

8. Because the court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit:

" You are instructed that at the time of the taking of possession by petitioner of the property now sought to be condemned and the erection of the buildings thereon petitioner had not the legal power to condemn property for its use and was not empowered to condemn until the month of February, A. D. 1883."

9. Because the court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit:

" You are instructed that under the law it is your duty to render a verdict in favor of respondent for the value of the property sought to be condemned, together with the buildings, as you may ascertain it to be at the date of the trial of this cause."

10 Because the court below erred in refusing to give to the jury the following instruction, asked on behalf of the respondent and plaintiff in error, to wit:

" You are instructed that under the admitted facts of the evidence before you, concerning which there is no conflict, that the respondent is entitled to a verdict from you to the effect that the value of the property sought to be condemned is forty thousand dollars."

11. Because the court below erred in instructing the jury of its own motion as follows:

"It appears that in April, 1881, a receiver's receipt was issued for a placer claim, and on the 18th of May, 1881, a patent was issued, and on the 1st day of July, 1881, the school board purchased from certain occupants of these premises this ground and paid $3,500.00 for it; that the land (less than an acre) was then worth $3,000.00."

12. Because the court below erred in instructing the jury of its own motion as follows:

" We all know that that which gives value to land in a city is not the efforts of any one man; that it is the aggregation and the efforts of many citizens. The government, in the spring of 1881, sells this placer claim for $2.50 an acre—I believe that is the price. In the same year an acre of that ground is worth $3,000.00, made so not by the efforts of this present owner, but by the efforts and toil of the public, represented by the government, land for which he pays $2.50, and the efforts of a small portion of the public have made that land worth $3,000.00, and that same public has taxed itself to put $40,000.00 worth of improvements upon it, to pay him for that full sum, $40,000.00. There is not one shadow of equity in it. Counsel says that this claimant is hurt by the conduct of this school district, so that he feels like insisting upon his pound of flesh. Well, all I can say is that this court is the poorest place on the continent for any man insisting upon a pound of

flesh, and if there was not a precedent or authority that justified such a ruling I would make one in this case. I never would put myself on record as saying that a man under the circumstances could compel the public to pay $40,000.00 for land on which they, under the circumstances, which they did in this case, could, under the advice of counsel, mistaken though it seems to be, pay the man holding possession and who delivered possession to them the sum of $3,500.00. If there is any equity in such a claim somebody else has got to sanction that before it can be allowed here."

13. Because the Court below erred in instructing the jury of its own motion as follows:

"You are instructed that the form of your verdict shall be as follows: We, the jury, find,

"1. That the accurate description of the property sought to be condemned in this action, is lots 812, 814, 816, 818, and the north thirteen and six-tenths (13.6) feet, and the east thirty-five (35) feet of lot 810 North Poplar street, and lots 211 and 213 East Ninth street, in Cooper's subdivision of the surface of the Sizer placer, U. S. Survey No. 388, situate in the county of Lake and State of Colorado, together with the improvements thereon.

"2. That the value of said property at this date is $3,000."

14. Because the Court below erred in rendering judgment.

ARGUMENT.

It is provided by article six of Amendments to U. S. Constitution that:

"No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Article 2 section 25 of the Constitution of the State of Colorado, following the above, reads as follows:

"That no person shall be deprived of life, liberty or property, without due process of law."

Again, following the Federal Constitution, that of Colorado provides, article 2 section 15:

"That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein invested ((?) divested); and whenever

an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

Section 242 of the Colorado Code of Civil Proceedure of 1883, provides *inter alia* that:

"At any stage of such proceedings, or of any proceedings under this act (eminent domain) the court or judge may by rule in that behalf made, authorize the said petitioner, if already in possession, and if not in possession to take possession of and use said premises during the pendency and until the final conclusion of such proceedings, and may stay all actions and proceedings against such petitioner on account thereof. Provided, such petitioner shall pay a sufficient sum into court, or to the clerk thereof, to pay the compensation in that behalf when ascertained. Provided further, that the judge of the court before or wherein any such proceedings are had shall determine the amount such petitioner shall be required to pay or deposit pending any such ascertainment; and in every case where possession shall be so authorized, it shall be lawful for the owner to conduct the proceedings to a conclusion, if the same shall be delayed by the petitioner."

The present right of defendant in error to condemn property for its use is not denied, but it is asserted that no such right existed prior to February 13, 1883, when it was conferred by the passage of the act of that year (Session Laws Colorado 1883, page 263), and which act is now section 3044 of the General Laws of Colorado, 1883, and reads as follows:

"It shall be lawful for any school district in this State to take and hold, under the provisions of chapter thirty-one of the General Laws, so much real estate as may be necessary for the location and construction of a school house, and convenient use of the school. Provided, that the real estate so taken otherwise than by the consent of the owner thereof shall not exceed one acre."

It is further asserted that defendant in error has not, up to the date of trial, taken any of the steps provided by the laws of Colorado authorizing the taking of or remaining in possession of the property which it seeks in these proceedings to condemn, either by making compensation for the same or by making, as provided by Sec. 242 of Code above cited, "a deposit in court pending the ascertainment of the compensation to be paid."

The first of the errors relied upon for reversal and stated in the specification, is the refusal to charge the jury "that one who knows the condition of the title, and who, against the protest

of the legal owner, without right or authority, makes improvements on the lands of another looses those improvements, and they become the property of the owner of the land."

There can be no doubt that under the evidence this instruction should have been given. The principle embodied in it is elemental. The case at bar certainly falls within it.

It is clear from the tenth and eleventh stipulations as to facts (page 11 of record), that the condition of the title was known to defendant in error prior to the time of its taking possession of the premises and erecting the building thereon. The first part of the tenth stipulation in terms admits that knowledge, the latter part of it sets up the fact of the employment of an attorney who advised defendant in error that the title and patent of plaintiff in error was worthless. That defendant in error thereupon subscribed to the funds of an association organized for the purpose of defeating the title of plaintiff in error.

The eleventh stipulation (Record p. 12) admits receipt of notice of the claims of plaintiff in error and his grantor, and the receipt of a warning from them that any building which might be erected would be claimed as the property of the owners of the land.

How could notice be more complete, and in what way could defendant in error have more strongly confessed itself a trespasser and a wrong-doer, than by entering into those stipulations which deprive its position of every shadow of equity? If this is so then certainly the instruction (No. 2 in specification of errors) "that the acts of petitioner in taking possession of the property of respondent, which it now seeks to condemn, and erecting buildings and improvements thereon were acts of trespass, and that the buildings and improvements erected during such possession by petitioner became, were and are the property of respondent," should have been given, and it was palpable error to refuse it.

The petition of defendant in error upon which this action is based admits the ownership of plaintiff in error of the premises sought to be condemned, and does not set up any separate ownership in itself of any buildings or improvements thereon, contenting itself with alleging that the buildings were erected by it in good faith, which allegation is contradicted and entirely refuted by its own stipulations.

Can it be contended that plaintiff in error could not have recovered the land with the buildings thereon if he had been permitted to proceed with his action in ejectment. What he could

have recovered in that action is what defendant in error is now seeking to obtain title to and what it should and must pay for?

This leads to the consideration of the refusal to instruct (No. 3 of specifications, Record p. 16) "that if you believe that the purchase by petitioner of the so-called 'squatter title' was made with full knowledge on the part of the petitioner of the outstanding patent title, then such purchase did not and does not operate to clothe petitioner with such color of title as would enable it to claim such improvements as its own property in subsequent proceeding to condemn the land upon which they stand."

This court has expressly decided, in Steel vs. Smelting Co., 106 U. S., 447, that such a purchase as that made by defendant in error does not constitute color of title and will not operate to prevent the owner of the land taking buildings without payment at the termination of a suit in ejectment.

The controversy in that case arose over patented premises known as the Starr placer, upon part of which the City of Leadville is built, and of which city the Sizer placer in dispute in this case forms another part. In the Smelting Co. case certain parties known as squatters took possession of the Starr placer and erected improvements thereon, and afterwards sought to estop Starr from obtaining possession of said improvements, because they were erected with his knowledge and without his protest. This court held that the squatters had notice of Starr's claim of title by virtue of his application for patent, and the publication and posting of the necessary notices required by law, and that while it is true that the owner of land cannot stand idly by and witness the erection of buildings thereon without protest, and then take those buildings without paying their value, still "that salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or the fact that he had none."

Brant vs. Coal & Iron Co., 93 U. S., 327.
Henshaw vs. Bissell, 18 Wall., 271.

Had plaintiff in error been permitted to prosecute his action in ejectment he would, under the decision in Steel vs. Smelting Co., be now in possession of the premises sought to be condemned, and if so in possession, who would have the hardihood to contend that he could be deprived of the title thereto by condemnation for any purpose without his being paid full compensation for the

land and buildings thereon, according to their exact value at the time of the trial to ascertain that compensation. Shall plaintiff in error then loose the value of those improvements simply because defendant in error is now in wrongful and unlawful possession of them, and has never even attempted to take the only step which would give it the color of right or title to that possession by making, pending the ascertainment of damages, the deposit in court provided for by the law?

It is so clear that the buildings were erected with full knowledge of the title of plaintiff in error and against his protest that the plea of color of title in defendant in error amounts to a practical absurdity, and there can be no doubt, under Steel vs. Smelting Co., *supra*, of the right of plaintiff in error to recover them in a suit in ejectment without paying their value. It was then clearly error to refuse the instruction last quoted.

The case would perhaps have been simpler if the prosecution of the action in ejectment had not been restrained, and judgment had been rendered therein and execution stayed until such time as the property for the possession of which judgment had been rendered could be condemned and compensation made.

The fourth and fifth specification of error was the refusal to instruct:

"That petitioner erected the buildings and made the improvements upon and took possession of the property sought to be condemned without right or legal authority, and that such acts did not change or impair the rights of the respondent in the land." "And that if you believe from the evidence that petitioner erected the buildings and made the improvements on the property now sought to be condemned with full knowledge of the existence of respondent's title, and against the protests of the respondent and Cooper, the then holder of the legal title, then petitioner is estopped from claiming that the improvements were made in good faith and under color of title."

Under the admitted facts of the evidence plaintiff in error was entitled to these instructions.

It is apparent from those facts that no single element of good faith entered into the acts of defendant in error in taking possession of the premises and erecting the buildings thereon. That such possession was taken without right or legal authority is manifest, and defendant in error cannot even claim that in taking possession it was exercising the right of eminent domain, because it did not have the right at the time, and did not receive power to

condemn, until February, A. D. 1883, over eighteen months after the commission of the trespass.

Had defendant in error possessed the right to condemn in July, A. D, 1881, something might possibly be said in extenuation of its acts and in favor of its claims to the improvements. This right, however, it did not possess, and it chose to declare the United States patent to the Sizer placer invalid in its own favor, and to subscribe funds to assist in setting the same aside, thereby placing the stamp of official sanction upon the squatter's acts, setting an example followed by hundreds of other squatters. Thus encouraged the squatters resisted the efforts of the owner of the Sizer placer to enforce his rights, and thereby put him to enormous expense to maintain them.

This conduct of defendant in error rendered it impossible for him then, and for years afterwards, to collect rents and sell lots and thus damaged him indirectly to an inconceivable amount.

It is this unjustifiable, arrogant and unlawful conduct which so damaged plaintiff in error, which now compels him to demand his pound of flesh in the payment for those buildings, regardless of public opinion, in order that his old age may be protected from want. Yet the jury was told in instruction 12 that there is not a shadow of equity in that demand of the plaintiff in error.

The sixth specification is the refusal to instruct:

"That a school district possesses only the same rights with regard to the exercise of its powers of eminent domain as any other individual or corporation having the power to condemn, and petitioner is not entitled to and should not receive at your hands any more sympathy because it is a school district than it would receive were it a railroad corporation or other person."

It was necessary that this instruction should be given to divest the minds of the jurors of that strong sympathy which exists in the heart of every citizen with the public school system, and to induce them to render to plaintiff in error the same measure of justice which they would have given had a railroad been seeking to condemn the property.

It may, and probably does appear a hardship that a school district in whose favor the sympathies of everybody should be and may be presumed to be aroused, should lose buildings in which it has invested large amounts of money, even though built on other's ground.

The authorities, however, are all in favor of the position that a

school district, State government, general government, other corporation or individual, who or which has the power to exercise the right of eminent domain, all stand upon an equal footing in the eye of the law, and that a corporation, no matter whether organized for educational purposes, for charitable purposes or for any purpose calculated to rouse the sympathy of a community in its favor, has and can acquire no more rights than an individual, by virtue of its wrongful and tortious acts, and can claim no privileges or immunities from the results of such acts which would not be accorded to an individual seeking to exercise the right of eminent domain for the purpose of gain.

Potter's Dwarris, 392–396.
U. S. vs. Lee, 106 U. S. 219, 220.

The instruction is the law and should certainly have been given.

The seventh specification is the refusal to instruct:

"That there is no warrant or authority in the constitution or laws of this State which empowers any corporation having the right to condemn property for public use to first take possession of the real estate of another and afterward make that taking legal and rightful by having the damages assessed with reference to the time when such wrongful possession was taken."

The section of the Constitution of Colorado already cited provides, that until compensation be paid to the owner, or into court for the owner, neither the property sought to be condemned nor the proprietary right of the owner therein shall be needlessly disturbed.

The taking possession by defendant in error of the property it now seeks to condemn was, being a gross trespass, certainly a needless disturbance of the owner's rights, and its continuing to hold that possession without making or even offering to make the deposit required by statute pending the ascertainment of damages, is an insolent defiance of law, and a violation of constitutional guaranties which would deprive it of every vestige of right to claim equity in a suit in equity.

How then in a suit at law, such as the case at bar, can it seek or ask, with soiled hands and admitedly a wrong-doer, equity, to which it is not entitled, simply because at a late day it has filed a petition to condemn the property, although it has not attempted to place itself within the provisions of the statute, under which it

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It is apparent from those facts that no single element of good faith entered into the acts of defendant in error in taking possession of the premises and erecting the buildings thereon. That such possession was taken without right or legal authority is manifest, and defendant in error cannot even claim that in taking possession it was exercising the right of eminent domain, because it did not have the right at the time, and did not receive power to

condemn, until February, A. D. 1883, over eighteen months after the commission of the trespass.

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The section of the Constitution of Colorado already cited provides, that until compensation be paid to the owner, or into court for the owner, neither the property sought to be condemned nor the proprietary right of the owner therein shall be needlessly disturbed.

The taking possession by defendant in error of the property it now seeks to condemn was, being a gross trespass, certainly a needless disturbance of the owner's rights, and its continuing to hold that possession without making or even offering to make the deposit required by statute pending the ascertainment of damages, is an insolent defiance of law, and a violation of constitutional guaranties which would deprive it of every vestige of right to claim equity in a suit in equity.

How then in a suit at law, such as the case at bar, can it seek or ask, with soiled hands and admitedly a wrong-doer, equity, to which it is not entitled, simply because at a late day it has filed a petition to condemn the property, although it has not attempted to place itself within the provisions of the statute, under which it

seeks to condemn, by making the deposit which would render its unlawful possession legal and provide the owner with the certainty of compensation when the damages shall be ascertained.

It is the certainty of compensation which is the primary step to and foundation of the right of eminent domain.

Potter's Dwarris, 390.
Cooley's Const. Lim. 562.

As the case now stands, it is optional with defendant in error at the end of this litigation whether it will pay the amount of the award, should it be for forty thousand dollars, or decline to do so. In the latter event it may continue in possession and contest the action in ejectment to a final issue over a period of perhaps five years, when plaintiff in error may succeed in obtaining possession of a building hopelessly out of repair and have on his hands a suit for mesne profits against a corporation even now insolvent.

The eighth specification of error is the refusal to instruct:

"That at the time of the taking of possession by petitioner of the property now sought to be condemned and the erection of the buildings thereon, petitioner had not the legal power to condemn property for its use and was not empowered to condemn until the month of February, A. D. 1883."

The above instruction, besides being the law, (see sec. 3044 Gen. Laws *supra*) should have been given to disabuse the minds of the jury of the belief that because defendant in error at the time of trial had the right to condemn, that it was in the exercise of that right that it took possession of the property and erected the building, and that it was, at the time of the trial, seeking to do what, by an oversight, it failed to do at the time it took possession. Had such been the fact something might have been urged in favor of equities which cannot now be advanced. From the time of the taking of possession until long after the completion of the building, defendant in error had no more rights than any other corporation or private individual not endowed with the power of condemnation.

A school district cannot be bound by acts of its board so clearly *ultra vires* and illegal, as the taking forcible possession of another's property without authority or right, and building thereon, knowing the conditions of the title. Counsel is in doubt whether the parties who erected the building could have recov-

ered the contract price of the same from the school district in a suit therefor. Certainly no mechanic's lien would have attached to the building as against the owner of the land, and the building can in no way, at the present time, be considered as an asset of the school district available as security for its bonded indebtedness. How then can it claim an advantage arising as a consequence of those acts when unratified by the other party affected?

The jury should have been clearly informed by the instruction last quoted that no sanctity attached to the defendant in error at the time of the trespass, which authorized it to commit, with impunity, acts, the punishment for which if committed by a private individual would involve the forfeiture to the land owner of the buildings wrongfully erected.

The ninth specification of error is the refusal to instruct:

"That under the law it is your duty to render a verdict in favor of respondent for the value of the property sought to be condemned, together with the buildings, as you may ascertain it to be at the date of the trial of this cause."

To refuse this instruction was error, because its giving was clearly authorized by Sec. 253 of the Colorado Code of Civil Procedure, which provides:

"In estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisement shall be allowed and awarded, and no deduction therefrom shall be allowed for any benefit to the residue of said property; but in estimating damages occasioned to other portions of claimant's property, or any part thereof other than that actually taken, the value of the benefits, if any, may be deducted therefrom. Provided, however, that in all cases the owner or owners shall receive the full and actual value of all property actually taken, and in case the benefit to the property not actually taken exceed the damages sustained by the owner to property not actually taken, the owner or owners shall not be required to pay, or allow credit for such excess."

By that section the jury, or appraisers, must find the actual and full value of the property at the time of the appraisement, which, in this suit, is the time of the legal taking and of trial. Defendant in error cannot be heard to contend that the value of the property as it was at the time of its illegal and forcible entry and taking of the same, shall now furnish the measure of damages which plaintiff in error can recover, and that defendant in error shall thus escape the penalty of its tortious acts.

The tenth specification of error is the refusal to instruct "that under the admitted facts of the evidence before you, concerning which there is no conflict, the respondent is entitled to a verdict from you to the effect that the value of the property sought to be condemned is forty thousand dollars."

The main question in the case was involved in this instruction. In other words it may be stated as follows: "A," not having at the time power to condemn, goes upon the land of "B," and against "B's" protest erects buildings thereon. After the completion of such buildings, "A" receives power to condemn for "A's" uses not to exceed one acre of land. Fifteen months after becoming vested with that power "A" seeks to exercise it over property owned by "B" and upon which "A" had erected buildings, knowing the condition of "B's" title. Before "A" can acquire title to such property by virtue of condemnation proceedings must he pay the full and actual value of the land, together with the buildings thereon, as it might be ascertained to be at the date of the legal taking and trial, as any stranger would be compelled to do? or, can "A" plead justification for acts originally illegal, and claim immunity from their consequences by virtue of the power of condemnation received eighteen months after their commission, and which power "A" does not seek to exercise until eighteen months after receiving it and three years after the commission of the original trespass?

The common law always gave the buildings erected by a trespasser with full knowledge of the condition of the title to the land on which he built to the legal owner of that land.

The weight of authority in condemnation suits follows the common law.

U. S. vs. Tract of Land, 47 Cal., 515.
Graham vs. Connersville R. R. Co., 36 Ind., 463.
Matter of Long Island R. R. Co., 6 N. Y. Sup. Ct., 298.
N. Y. & West Shore R. R. Co. vs. Gennet, 37 Hun., 317.
Meriam vs. Brown, 128 Mass., 391.
Dietrich vs. Murdock, 42 Mo., 279.
Hibbs vs. Chicago R. R., 39 Iowa, 340.
Farrar vs. Stackpole, 6 Maine, 154.

In the case of United States vs. Tract of Land, 47 California, 515, the United States entered upon property claimed by one "Jack" under an unconfirmed Mexican grant and against his

protest erected a light-house thereon. The grant was subsequently confirmed and thereupon the United States proceeded to condemn the property and sought to pay only the value of the land. The Supreme Court of California held that the value of the buildings, being part of the realty, as well as the value of the land, must be paid. The case at bar is infinitely stronger than the light-house case. In that case Jack's title was unconfirmed, and the United States was, at the time of entry, endowed with the power to condemn. In the case at bar the title of plaintiff in error was evidenced by a patent, regular upon its face, and defendant in error was not empowered to condemn.

The case of Graham vs. Connersville R. R. Co., 36 Ind., 463, is precisely like the light-house case. In the last case the railroad company, having at the time the right to condemn, and knowing the condition of the title, entered upon Graham's land, against his protest, and built upon it a hotel and depot. In subsequent proceedings to condemn, the R. R. Co. was compelled to pay the value of the hotel and depot. The other cases cited are to the same effect.

The eleventh specification of error is the giving of instruction that "it appears that in April, 1881, a receiver's receipt was issued for a placer claim, and on the 18th day of May, 1881, a patent was issued, and on the 1st day of July, 1881, the school board purchased from certain occupants of these premises this ground and paid $3,500 for it; that the land (less than an acre) was then worth $3,000."

This instruction was totally irrelevant, and it should not, therefore, have been given. The fact that the defendant in error had purchased land prior to taking possession from certain occupants or squatters for $3,500 had nothing to do with this case, and charging concerning the transaction, dignifying it by the name of purchase, could not fail to prejudice the plaintiff in error before the jury.

The twelfth specification of error is to that part of the charge to the jury as follows: "We all know that that which gives value to land in a city is not the efforts of any one man; that it is the aggregation and the efforts of many citizens. The government, in the spring of 1881, sells this placer claim for $2.50 an acre—I believe that is the price. In the same year an acre of that ground is worth $3,000, made so not by the efforts of this present owner, but by the efforts and toil of the public, represented by the government, land for which he pays $2·50, and the efforts of a small

portion of the public have made that land worth $3,000, and that same public has taxed itself to put $40,000 worth of improvements upon it, to pay him for that full sum, $40,000. There is not one shadow of equity in it. Counsel says that this claimant is hurt by the conduct of the school district, so that he feels like insisting upon his pound of flesh. Well, all I can say is that this court is the poorest place on the continent for any man insisting upon a pound of flesh, and if there was not a precedent or authority that justified such a ruling I would make one in this case. I never would put myself on record as saying that a man under the circumstances could compel the public to pay $40,000 for land on which they, under the circumstances, which they did in this case, could, under the advice of counsel, mistaken though it seems to be, pay the man holding possession and who delivered possession to them the sum of $3,500. If there is any equity in such a claim somebody else has got to sanction that before it can be allowed here."

Counsel ventures to suggest that the first half of the instruction reads as if it might have been quoted bodily from Henry George's "Progress and Poverty." However admirable the teachings of that work it has not, counsel believes, yet become an authority by which the rights of litigants can be weighed or adjusted.

It is almost impossible to believe that the learned judge who gave the instruction last quoted, while sitting as judge in this case, could have said as he did, while sitting as chancellor in McElroy vs. Kansas City (21 Fed. Rep. 260):

"That in these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and when the urgency of so called public improvement rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own."

The case last cited arose in Missouri.

The section of the constitution of Colorado relating to the taking of private property for public use is practically word for word identical with the relative section in the constitution of Missouri. Were it not so, the federal constitution and that of each of the States mentioned guarantees "that no person shall be deprived of life, liberty or property without due process of law." It is evident that plaintiff in error has been deprived of his property rights without due process of law and that he is still divested of those rights by defendant in error without even an attempt on its part to comply with the requirements of the statute law.

The certainty of compensation is the primary requisite to the appropriation of lands for public use under the right of eminent domain.

Potter's Dwarris on Statutes 390.
Cooley's Const. Lim. 699.

That compensation must be not only certain but provided for prior to or pending the proceedings. See

2 Kent's Commentaries 339.
Bloodgood vs. M. & H. R. R. Co. 18 Wendell 17.
Bonaparte vs. C. & A. R. R. Co. 1 Baldwin C. C. 205.
Garrison vs. City of New York, 21 Wallace 204.
Potter's Dwarris Statutes 387–392.

The statutes of Colorado provide either for payment before the taking possession, or in case of disagreement between the owner and the condemning party, for a deposit in court "pending the ascertainment of damages." No payment was made in this case, and no attempt was made to deposit in court an amount which would indemnify plaintiff in error.

Is plaintiff in error to be compelled to recover damages at law should defendant in error decline to pay the amount which may be awarded? To again cite the case of McElroy vs. Kansas City, *ante*, "damages at the end of a long and wearisome litigation is no adequate recompense; an individual contesting in an action with the public is at such a disadvantage that equity will not remit him to such action, but interfere in advance to enforce protection." How has equity protected this plaintiff in error? By restraining his action in ejectment pending condemnation proceedings without compelling a deposit in court pending those proceedings, to pay for his property, and thereby depriving him of that property and the use thereof without giving him in return the remotest certainty of compensation in the end, and no prospect of payment of any damages except at the end of a long and wearisome litigation against an insolvent corporation.

This is the situation of the plaintiff in error which the learned judge in his charge to the jury says does not possess "a shadow of equity," practically saying that the buildings represent an unearned increment of wealth which only a Shylock would dare to demand, and should not receive at the Court's hands. That the defendant in error, although a wrong-doer and trespasser, committed the wrong under advice of counsel, mistaken though it

was. That defendant in error, although it had squandered and misapplied the money of that same public by paying $3,500 to persons not entitled to it, would now, by a court of law, be taken under the shadow of an equity denied to plaintiff in error, and would be by that Court protected against the consequences of its illegal acts by being allowed to claim the buildings tortiously erected, as its own property. What a premium is here offered to the persons having charge of "so-called public improvements, the urgency of which rests as a constant menace upon the sacredness of private property," to disregard the law and all its provisions knowing that it can do so with impunity, and with the consciousness that if the owner should seek to dispossess them they can at any time commence a so-called action in condemnation and have the value of the property damaged assessed as of the time of the trespass, on the principle that the owner of the land has no title in buildings tortiously erected thereon, because as far as the owner of the land is concerned such buildings represent an unearned increment of wealth.

If such a doctrine can be upheld, then certainly this Honorable Court erred in rendering its decision in Steel vs. Smelting Company *supra*, thereby depriving thousands of squatters or men in possession on the Starr placer of their improvements, who all availed themselves of "the advice of counsel, mistaken though it seems to be," and who all contributed to the same fund as defendant in error for the defeat of the patent titles. If such a doctrine cannot prevail, then most certainly the court erred in directing a verdict (13th specification of error, p. 18 Record), that the value of the property sought to be condemned at the date of the trial was three thousand dollars and in rendering judgment under it.

For the reasons stated, counsel contends and respectfully asks that the decision of the court below be reversed and the cause remanded, with instructions that a judgment be entered that the value of the property sought to be condemned was, at the date of the trial, forty thousand dollars, and that defendant in error be ordered to pay that amount within ninety days after the entry of such judgment, or failing to pay the same to surrender possession of the property to plaintiff in error.

Most respectfully submitted,

SAM P. ROSE,

FRANK W. OWERS,

Oct. 28th, 1889. *Of Counsel for Plaintiff in Error.*

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

UNITED STATES OF AMERICA, SS:

IN THE

SUPREME COURT

OF THE

UNITED STATES.

To the October Term thereof, A. D. 1889.

R. S. SEARL,

Plaintiff in Error,

vs.

School District No. 2, in the County of Lake and State of Colorado,

Defendant in Error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

C. S. Thomas,

Attorney for Defendant in Error.

WHIPPLE, PRINTER.

UNITED STATES OF AMERICA, SS:

IN THE SUPREME COURT
OF THE
UNITED STATES.
TO THE OCTOBER TERM THEREOF, A. D. 1889.

R. S. SEARL,
Plaintiff in Error,
vs.
SCHOOL DISTRICT NO. 2, IN THE COUNTY OF LAKE AND STATE OF COLORADO,
Defendant in Error.

Brief and Argument of Defendant in Error.

This proceeding is one for the acquiring by the defendant in error of whatever interest the plaintiff in error has in the property in controversy, through the exercise of the right and power of eminent domain.

The stipulated facts are as follows, to wit:

"For the purpose of the present hearing and trial only, of the above entitled action or proceeding, either in this

Court, where it is now pending, or in the Supreme Court of the United States, where it may be taken on appeal, or writ of error, the following facts are agreed upon, by and between the respective parties hereto, to-wit:

FIRST. That a Receiver's receipt was issued for the Sizer Placer, United States Survey No. 388, on the 16th day ot April, A. D. 1881, out of the District Land Office of the United States, at the City of Leadville, in the State of Colorado, to one Isaac Cooper, claimant.

SECOND. That on the 18th day of May, A. D. 1881, a United States Patent was issued to the said Isaac Cooper, for the said Sizer Placer.

THIRD. That the land sought to be condemned in the present proceeding, is a part of the said Sizer Placer.

FOURTH. That since the 20th day of November, A.D. 1882, and before the institution of this proceeding, the said Isaac Cooper conveyed to the said R. S. Searl, the said Sizer Placer, and the said Searl, by virtue thereof, is now the owner and holder of the said patent title thereto.

FIFTH. That prior to the application for patent to the said Sizer Placer, and up to the time when the said School Board purchased the same and took possession thereof, the land herein sought to be condemned, was occupied, possessed, improved, and the ownership thereof claimed by persons holding under what was called and known as a "squatter title."

SIXTH. That on or about the first day of July, A.D. 1881, the said School Board purchased and took conveyances of the land now sought to be condemned, with the buildings and improvements thereon made and erected by the said squatter occupants, from such occupants, and paid

therefor the sum of Thirty-five Hundred Dollars ($3500.00).

SEVENTH. That on or about the 30th day of July, A.D. 1881, the said School Board went into actual possession of the Lots described in the petition herein, and immediately commenced to build, and on the 30th day of January, A.D. 1882, prior to the institution of these proceedings, completed improvements suitable and appropriate for educational purposes, at a cost to the said School District, of Forty Thousand Dollars ($40,000.00), which property it has since possessed and occupied and still occupies for school purposes.

EIGHTH. That at the time of the commencement of this action and institution of these proceedings in condemnation, the land described in the petition herein, together with the improvements theron, so made by the said School Board, as aforesaid, was of the value of Forty Thousand Dollars ($40,000.00).

NINTH. That at the said times of taking possession, and at the time of the commencement of this action and the institution of these proceedings in condemnation, the land described in the petition herein, without the improvements thereon made by the School Board, was of the value of Three Thousand Dollars ($3,000.00), and that the area of same is less than one acre.

TENTH. That petitioner had knowledge of the issuance of a U. S. Patent covering the property sought to be condemned, prior to the purchase of the title which it subsequently purchased, and which was known as the squatter title. That prior to such purchase, petitioner employed and paid reputable counsel to investigate said title. That the counsel so employed reported in favor of the validity of the so-called squatter title, and against the validity of the

U. S. Patent. That believing said, so-called, squatter title to be better than the title conveyed by U. S. Patent, petitioner purchased the same. That after said purchase, petitioner subscribed to the funds of an association organized for the purpose of endeavoring to defeat said patent title.

ELEVENTH. That prior to the commencement of, and during the erection of the school building now standing on the land sought to be condemned, the Board of School Directors of Petitioner was notified on behalf of Respondent, who at that time owned an equitable interest in the said property, and on behalf of Respondent's grantors, that any building said School District might erect on said lots would be erected at the peril of the said School District, and would be claimed, when completed by Respondent and his grantor: but the said School District, having purchased the said lots of the squatters in possession, as aforesaid, and believing that it had the better title thereto, proceeded, notwithstanding such notice, and made and erected said improvements, as aforesaid.

And in view of the Statute (Dawson's Colorado Code, p. 80, Sec. 253), and for the purpose of putting as speedy an end to contention as possible, it is further stipulated, that the foregoing values may be taken as the actual values at the time of the trial of this suit, and that the property sought to be condemned is for public use, and, within the meaning of the law, is necessary for the School District.

TWELFTH. That R. S. Searl, is now, and was at the time of the commencement of these proceedings, a citizen and resident of the State of Kansas."

This is all the evidence of any importance or relevancy introduced upon the trial.

The plaintiff in error assigns fourteen errors, and seeks a

reversal of the judgement upon strictly technical legal principles legitimately applicable only to an action of ejectment by the patentee against an intruder upon the public domain, where the only subject of controversy is the value and ownership of improvements made prior to the issue of the patent.

It is not supposed to be necessary or productive of any considerable benefit to examine these assignments in detail; for the reason, that the theory upon which they are based differs so widely from that which is supposed, by the defendant in error, to fix, govern, and control the rights of the parties, that the statement of the latter, together with a citation of some of the authorities supporting it, will either prove the inapplicability of the former, and the non-existence of error, or demonstrate its own infeasibility.

It will not be questioned, that in an action of ejectment in a Federal Court the legal title must prevail (Langdon vs. Sherwood, 124 United States, 74); and that no matter how strong the equitable claim to improvements or how deep the color of title under which they were made, unless some statute clothes the equity with a legal right, they cannot be recognized or distinguished from the land of which, in such action, in a court of law, they are held to form a part.

But this proceeding, though not a suit in equity proper, is in this sense equitable: that the damages to be assessed and recovered are such as ought *justly* to be paid and received.

Morgan's Appeal, 39th Michigan, 675, 679;

Oregon Railway and Navigation Company vs. Mosier;

14th Oregon, 519; Same Case, 58th Am. Rep. 321, 326.

In the language of Mr. Justice Graves, who delivered the Opinion of the Court in Morgan's Appeal, *supra*:

"The proceeding is not an action by 'plaintiff in error' to recover damages for past trespasses, nor an ejectment on 'his' part to compel the 'School District' to restore possession, and as incidental thereto to forfeit erections constructed in its own wrong.

"The nature of it is different. It is no part of its object to compel the 'School District' to sacrifice the cost of its 'improvements upon the land,' either by enforced abandonment on the one hand or enforced payment of the value to the land owner on the other.

"It is a proceeding by the 'School District' to secure in a lawful way the right to take and use the land, a right not previously obtained; and the only terms the law imposes, in case the taking and use are sanctioned, is the payment of such damages or compensation as ought *justly* to be made. And certainly it would not be *just* to require the 'School District' in this proceeding to pay 'plaintiff in error' for the identical 'improvements' the 'School District' has constructed in order to carry out the specific use and purpose for which the land is required."

The lands involved in this proceeding were entered and paid for at the District United States Land Office at Leadville, in the State of Colorado, on the 16th day of April, A. D. 1881, and conveyed by United States Patent to one Isaac Cooper, on the 18th day of May, A. D. 1881.

1st and 2nd Specification of Facts.

After the issue of said patent, at the time aforesaid, and before the purchase by the School District, this particular property was found to be very desirable, indeed, next to a necessity, for educational purposes; but it was occupied and

possessed by persons claiming title adversely to the patentee, and who had made valuable and lasting improvements thereon. In this dilemma the School Board of defendant in error did just what any prudent corporation must and should have done: it employed the best legal talent attainable and empowered and directed it to investigate and determine what title, if any, to the said property was valid and paramount.

Such investigation and determination resulted in favor of the title of the said persons in possession and who had made the improvements as aforesaid, upon the faith of which determination and advise, and believing that such title was the better and paramount one, on the 1st day of July, A. D. 1881, it purchased the said property of the said occupants, and paid therefor the sum of Thirty-five Hundred Dollars ($3500.00), the same being Five Hundred ($500.00) more than the then value thereof, the latter doubtless being a bonus for the necessity of obtaining the property; upon which the said parties in possession thereof conveyed the said property, by appropriate deeds of conveyance, to the said School District.

In further evidence, verification and demonstration of the confidence of the School District in the validity of the title thus obtained, and its perfect good faith in obtaining it, on the 30th day of July, A. D. 1881, it took actual possession of the said property so purchased, and erected a school building thereon at a cost, and of the value, of Forty Thousand Dollars ($40,000.00).

It seems difficult to imagine a case of the purchase of real property by a corporation where more perfect good faith *in fact* could exist or be manifested.

But it is contended by the plaintiff in error, that, notwithstanding the fact that the purchase was made in perfect

good faith, and the school building erected in the actual belief that the title so obtained was perfect, yet, because it had notice that some time prior thereto a patent had been issued by the Government, this good faith in fact could not exist in law; that in order to possess or be credited with legal good faith there must be no error committed in determining the validity of the title to be purchased, or in acquiring the paramount one.

Consistently with this contention, it is not quite clear to the defendant in error what purpose good faith could accomplish or perform where the title obtained was perfect without its aid, and regardless of its existence

Pillow vs. Roberts, 13th Howard (U. S.), 472;

Dillingham vs. Brown, 38th Alabama, 311;

Little vs. Magguier, 2nd Main, 176;

Brackett, Petitioner, 53rd Main, 236;

Herrick vs. Doe, 4th Indiana, 164;

Sutton vs. McLoud, 26th Georgia, 638;

Bailey vs. Doolittle et. al, 24th Illinois, 578, 579.

This Court, in defining the words "good faith" in a statute of the State of Illinois, from which that of the State of Colorado, with regard to the limitation of real actions, was copied, borrowing and adopting the language of the Supreme Court of the State of Illinois, says:

"Good faith is doubtless used here in its popular sense, as the actual existing state of the mind, whether so from ignorance, skepticism, sophistry, delusion, or imbecility, and without regard to what it should be from given legal standards of law or reason."

Wright vs. Mattison, 18th Howard (U. S.), 52, 59;

Woodward vs. Blanchard, 16th Illinois, 424, 432, 433;

McCagg et al. vs. Heacock, et al., 42nd Illinois, 156.

"Good faith, within the meaning of this statute, I understand to be the opposite of fraud and of bad faith; and its non-existence, as in all other cases where fraud is imputed, must be established by proof."

McConnel vs. Street et al., 17th Illinois, 254;

McCagg et al. vs. Heacock et al., 42nd Illinois, 157;

McCagg vs. Heacock, 34th Illinois, 478, 479;

Brooks vs. Bruyn, 35th Illinois, 394, 395;
Morrison et al. vs. Norman, 47th Illinois, 479.

Surely, within this definition, it would require a refinement of skepticism beyond experience, observation or comprehension to doubt the honest purpose and good faith of the School Board in the acquisition of this property in the manner and by the methods pursued; or that the actual state of mind of that body, at that time and during that act, might not have been created or influenced by "ignorance, skepticism, sophistry, delusion or imbecility, and without regard to what it should be from given legal standards of law or reason"

Wright vs. Mattison, supra.

And, inasmuch as all titles to lands in the United States are supposed to have emanated from the Government, and, at some former period, to have been conveyed by it by patent, it is not very clearly perceived how notice, that this one was no exception, can injuriously affect the good faith with which the property was sought and obtained.

"The doctrine is that bad faith, as contra-distinguished from good faith is not established by showing actual notice of existing claims or liens of other persons to the property, or

by showing a knowledge, on the part of the holder of the color of title, of legal defects which prevent the color of title from being an absolute one. When there is no actual fraud, and no proof showing that the color of title was acquired in bad faith, which means in or by fraud, this Court will hold it was aquired in good faith."

McCagg et al. vs. Heacock et al., 42nd Ill. 157, supra ;

Ewing vs. Burnett, 11th Peters (U. S.), 41 ;

McCagg vs. Heacock, 34th Illinois, 480, 479 ;

Bogardus vs. Trinity Church, 4th Paige, 200 ;

Clapp vs. Bromaghan, 9th Cowen, 558;

Chickering et al. vs. Failes, etc., 26th Ill. 519-521;

Cook vs. Norton, 43rd Illinois, 393, 394.

The sufficiency of the color of title under which the School District entered and took possession of the property now sought to be condemned, is not questioned by the plaintiff in error.

Indeed, it could not be, with any hope of success, in the face of his stipulation that it was conveyed to the District by persons in the peaceable possession thereof, claiming title thereto, and who had made valuable improvements thereon.

Consistently with this stipulation, it must be assumed, that the conveyance mentioned was regular in form and purported to pass an absolute title in fee ; and that such was the title claimed by the grantors of the District.

While these elements are not all necessary to the establishment of color of title, their existence cannot weaken the color.

" The Courts have concurred, it is believed, without an

exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith."

Wright vs. Mattison, 18th Howard (U. S.), 56;

Woodward vs. Blanchard, 16th Illinois, 430, 431;

McCagg vs. Heacock, 34th Illinois, 478;

Brooks vs. Bruyn, 35th Illinois, 394;

Morrison et al. vs. Norman et al., 47th Ill., 478, 479;

Dickenson vs. Breeden, 30th Illinois, 326;

Lebanon Mining Co. vs. Rogers, 8th Colorado, 36, 37;

Cook vs. Norton, 43rd Illinois, 393, 394;

Hinkley et al. vs. Green, 52nd Illinois, 227.

This belief of the School District, that the title obtained was the better and paramount one, agreed upon and contained in the foregoing stipulation, is an ultimate fact to which all evidential facts upon the same subject are drawn, and in which they are merged; and must necessarily include honest intention, pure motive, good faith and absence of fraud. And it suffers nothing from being based upon the legal advise of reputable counsel.

Wherever a state, condition or emotion of the mind has become material in giving legal character to an act performed, the advice of counsel learned in the law, under the

influence of which the act was done, has ever been deemed and held controlling, even to the extend of alone excusing and exonerating from crime, as well as from civil liability.

State vs. Cutter, 36th New Jersey Law, 125-128;

The People vs. Whaley, 6th Cowen (N. Y.), 661;

The Commonwealth vs. Shed, 1st Mass. 228;

The Commonwealth vs. Bradford 9th Met. (Mass), 268:

Roy vs. Goings, 112th Illinois, 656;

Brewer vs. Jacobs, 22nd Federal Reporter, 217;

Sharpe vs. Johnson, 76th Missouri, 660;

Smith vs. Austin, 49th Michigan, 286;

Sparling vs. Conway, 75th Missouri, 510;

Forbes vs. Hagman, 75th Virginia, 168;

Legan vs. Maytag, 57th Iowa, 107;

Kingsbury vs. Gardner, 45th N. Y. Supr. Ct. 224;

Decoux vs. Lieux, 33rd La. Ann. 392;

Cooley on Torts (1st ed.), p. 183, and cases cited;

2nd Greenleaf on Evidence, Sec. 459, and cases cited;

Notes vs. Bates, 80th Alabama, 382;

Johnson vs. Miller, 69th Iowa, 562;

Moore vs. Northern Pacific R. R. Co., 37th Minn. 147;

Jones vs. Jones, 71st California, 89;

Cuthberth vs. Galloway, 35th Federal Rep. 466;

Mesher vs. Iddings, 72nd Iowa, 553;

Shippel vs. Norton, 16th Pacific Reporter, 804.

Why should not this principle, the existence of which is thus generally recognized, exercise an influence quite as potent upon a municipal corporation, which must alone act by and through agents and attorneys, as upon natural persons, in the formation of that state of mind requisite to the existence of good faith ?

The defendant in error, therefore, having entered under color of title and in good faith, must necessarily have erected its school building in equal good faith for the public purposes for which the land was required, notwithstanding the notice of the plaintiff in error, before he had acquired any legal interest in any title to the property, that he intended to appropriate the result of its labor and expense to his own use and benefit, while it continued to believe that it had acquired, held and owned the better title to the property.

Templeton vs. Lowry, 22nd South Carolina, 389 ;

19th Blatchford, C. Ct., 94.

Improvements thus made upon the land of another, by one in good faith believing himself to be the owner thereof, in equity belong to the party who made them.

2nd Story's Equity Jurisprudence, Sec. 1237, and

Note 1, and cases cited ;

Bright vs. Boyd, 1st. Story's C. Ct., 478 ;

Same Case, 2nd Story's C. Ct., 605 ;

Putnam vs. Ritchie, 6th Paige (N. Y.), 390 ;

Williams vs. Gibbes, 20th Howard (U. S.), 535 ;

Fee vs. Cowdry, 45th Arkansas, 410 ;

Same Case, 55th American Reports, 560 ;

Barker vs. Owen, 73rd North Carolina, 198, 405;

Howard vs. Massingali, 13th Lea (Tenn.), 577;

3rd Pemeroy's Equity Jurisprudence, Sec. 1241, and cases cited;

Smith vs. Drake, 23rd New Jersey Equity, 302;

Miner vs. Beekman, 50th New York, 337;

McLaughlin vs. Barnum, 31st Maryland, 425;

Sale vs. Crutchfield, 8th Bush, (Ky.), 636;

Preston vs. Brown, 35th Ohio State, 18;

Johnson vs. Pelot, 24th South Carolina, 254;

Same Case, 58th American Reports, 253, 256;

Cooley on Constitutional Limitations, (2nd ed.), 386.

And it has always been, and now is, the law, independently of any statute, that when the owner of the land, improved as this was and is, was compelled to or did resort to a court of equity and invoke its powers to secure the land, or some interest in, or right with reference to it, he was, and will be, required to make compensation for the improvements, as a condition to the granting to him, or the obtaining by him of any relief; on the universal principal that "he who asks equity must do equity."

Call vs. Chase et al., 21st Wisconsin, 513;

Pierce vs. Schutt, 20th Wisconsin, 424;

Bond vs. The City of Kenosha, 17th Wisconsin, 287;

Plato vs. Roe, 14th Wisconsin, 458;

Warden et al. vs. the Board of Supervisors of Fon

Du Lac County, 14th Wisconsin, 620;

Smith vs. The Auditor General, 20th Michigan, 409;

Hamill vs. Thompson, et al., 3rd Colorado, 521;

Harts et al. vs. Brown et al., 77th Illinois, 234;

1st Pomeroy's Equity Jurisprudence, Sections 385, 388, and cases cited, and cases last above cited.

It is true, that in the absence of a statute furnishing a remedy which may be made available upon the application of the occupant, either the aid of a court of equity must become requisite on behalf of the owner of the land against whom the claim for reimbursement is made, so that such owner can be compelled to do equity as a condition of obtaining equity, or else there must be some element of fraud in the transaction of which such owner is guilty as ground of equitable interference, or the improvements made, no matter with what good faith, will be lost to the equitable owner.

If, therefore, the true owner can recover his land by an action at law, equity will not, in the absence of fraud, compel him to reimburse the occupant for disbursements made even in good faith in repairs and improvements; not because they do not equitably belong to him, but because the equity powers of the court cannot be so invoked as to furnish him a remedy to secure and protect that which is confessedly his. In such case his condition furnishes one of the instances of an acknowledged right without a remedy, and illustrates the over-refinement of equity jurisprudence at the expense of justice.

Moore vs. Cable, 1st Johnson's Chancery, 385;

Green vs. Winter, 1st Johnson's Chancery, 26, 30;

Putnam vs. Richie, 6th Paige, 300, 403;

Bright vs. Boyd, 1st Story's C. Ct., 478, 494.

That this is so detracts nothing from the strength of the position of the defendant in error as equitable owner of these improvements, although the statute under which this proceeding is being had and conducted does not affirmatively provide that the value thereof shall not be added to the value of the land taken and condemned, and presented to the land owner as a recompense for his delay and negligence, if not shrewd financial cunning, in failing to institute proceedings to recover the land until after this great outlay had been made, this great expense of Forty Thousand Dollars had been incurred, and the erection of the school building completed, though amply notified of every step taken with reference thereto from the commencement to the completion thereof.

This proceeding, as has been seen, requires only such compensation to the land owner as shall be *just* for what property belonging to him has been taken and appropriated to public use under the statute, and such only as shall be *just* to be paid by the party appropriating such as belonged to the land owner and not to the approprietor: And the only question to be determined is; what, under the circumstances, is or would be *just* compensation for the property which the plaintiff in error has lost by the condemnation?

He claims that he has not only lost the land-soil, which he bought from the Government, but also the present superstructure--the Forty Thousand Dollar school building, which he never purchased from any one; but which he has, as he claims, fallen heir to by reason of a species of for-

feiture incurred by the School District because of its belief in the validity of some other title than his, and with good faith acting upon that belief while it had notice that a patent had been issued.

And he cites in support of this contention :

U. S. vs. Tract of Land, 47th California, 515 ;

Graham vs. Connersville R. R. Co., 36th Ind., 463 ;

Matter of Long Island R. R. Co., 6th N. Y. Sup. Ct., 298 ;

N. Y. and West Shore R. R. Co. vs. Gennet, 37th Hun., 317 ;

Meriam vs. Brown, 128th Mass., 391 ;

Dietrich vs. Murdock, 42nd Missouri, 279 ;

Hibbs vs. Chicago R. R., 39th Iowa, 340 ;

Farrar vs. Stackpole, 6th Maine, 154.

These authorities, so far as accessible, hold, that a wilful trespasser without color or claim of title can legally acquire nothing by his wrong ; which doctrine is understood to be unobjectable, and might be supported by many more authorities ; though the application of it to the case in hand is not very apparent.

But the effort of the defendant in error has been to demonstrate that the School District had, prior to the commencement of this proceeding, acquired an equitable property in the improvements it had made, and was not a wilful trespasser without color or claim of title, and, therefore, not within the rule of this line of authorities : And, being an equitable owner of its own structures, whether or not any

statute authorized a recovery for them, the *just* compensation for what it had innocently taken of another's, which, as has been seen, is the basis of this proceeding, would not include that which was already equitably its own.

And, assuming that this equitable element of property in these improvements has been established in the defendant in error (as is thought may now be safely and appropriately done), the contention of the plaintiff in error, that such construction of the statute of condemnation as would limit the estimate of *just* compensation to the land proper taken exclusive of the improvements not taken but retained, would be violative of the Colorado Constitutional protection of vested rights, for the reason that the delegation of the power to exercise the right of eminent domain was not made by the State of Colorado to the School District until after the improvements had been made and the school building completed, and there being then no law by which compensation therefore could be enforced, it and they became his property by virtue, not of any equity or merit, but by a *casus omissus* in legislation, of which he could not be deprived by either subsequent statute or construction, must be without point in this connection; for the reason that, "courts do not regard right as vested contrary to the justice and equity of the case."

Cooley on Constitutional Limitations (2nd ed.), pp. 388, 389, and cases cited;

Davis's Lessee vs. Powell, 13th Ohio, 308;

Fee vs. Cowdry, 45th Arkansas, 410;

Same Case, 55th American Reports, 560;

Bacon vs. Callender, 6th Mass., 309;

North Hudson County R. R. Co. vs. Booraem,

28th N. J. Eq. 450, 456, 457, 458, and cases cited;

Oregon Railway and Navigation Company vs. Mosier, 14th Oregon, 519; S. C. 58th Am Rep. 321, 324, 325, and cases cited; 60th Iowa, 740;

Cooley on Constitutional Limitations (2nd ed.), pp. 376, 377, 378, and cases cited;

Chestnut vs. Shane's Lessee, 16th Ohio, 599, 609, 610;

Templeton vs. Lowry, 22nd South Carolina, 389.

It is true, that "in estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisement shall be allowed and awarded."

Dawson's Colorado Code, p. 80, Section, 253.

But this is in no way inconsistent with the construction above given to it, and only means the value of whatever title or interest the land owner or claimant had in the premises at the time they were taken, estimated as of the date of appraisement;—"the value which the land or interest taken would now (date of appraisement) have if the 'school building' had not been constructed upon it."

Lyon and Wife vs. The Green Bay and Minnesota R'y Company, 42nd Wisconsin, 538;

Knoth vs. Barclay, 8th Colorado, 302, 303, 304;

Mills on Eminent Domain, Secs., 65, 160, and cases cited.

The case of Lyon and Wife vs. The Green Bay and Minnesota R'y Co., supra, is the construction of a statute literally the same, in this respect, as that of Colorado, above quoted.

Indeed, this statute and law of eminent domain, and the delegation of the power to exercise it to and by the school board or school district, does not create demands where none before existed. It simply provides a means by which the validity and value of existing claims can be determined, and existing and well recognized equities secured and made available.

County of Caldwell vs. Crocket, 4th S. W. Rep., 612;

Barker vs. Torrey, 4th South Western Reporter, 649.

But without this equity, so incontrovertibly (as is thought) established, and *a fortiori* with it, the public use for which the property was taken should devest both the act and the actor of any and all wilful wrong which would forfeit the fruit of labor and expense made and performed, in a subsequent proper proceeding to obtain legally what had been sought erroneously, but for a purpose incompatible with wilful trespass.

It is true, that this view, stripped of the equity, is not consistent with the doctrine held by the case of The United States vs. Tract of Land, supra, so much relied upon by the plaintiff in error; but it will be found to be consistent with and to be supported by, the great weight of authority upon the subject; which establishes the position assumed by the defendant in error, that, in estimating the *just* compensation to be paid to the owner of the paramount title in this proceeding to acquire it under this statute, the value of improvements made upon the lands prior thereto for a public use and purpose (and *a fortiori* with belief of ownership) will be excluded therefrom;--that such estimate will be limited to what the value of the property taken would have been

had no improvements been made.

Lyon and Wife vs. The Green Bay and Minnesota R'y Company, 42nd Winconsin, 538;

Kennedy vs. The M. and St. P. R. R. Co. etc., 22nd Wisconsin, 582, 585, 586, 587, 588;

Cohn vs. St. Louis, Fort Scott and Wichita Railroad Company, 34th Kansas, 158; S. C. 55th Am. Rep., 242;

California P. R. R. Co. vs. Armstrong, 46th Cal., 85;

Morgan's Appeal, 39th Michigan, 675;

Dietrich vs Murdock et al., 42nd Missouri, 284, 285;

Justice vs. Nesquehoning Valley R. R. Company, 87th Pennsylvania State Reports, 28, 32;

Jones vs. New Orleans and Selmee R. R. Company, 70th Alabama, 227;

Texas and St. Louis R. R. Company vs. Mathews, 60th Texas, 215;

Tol. A. A. and G. T. R'y vs. Dunlap, 47th Michigan, 456;

Mills on Eminent Domain, Sec. 148, and cases cited.

North Hudson County R. R. Company vs. Booraem, 28th New Jersey Equity, 459;

Oregon Railway and Navigation Company vs. Mosier, 14th Oregon, 519; S. C. 58th Am. Rep., 321;

Daniels vs. The C. I. and N. R. Co., 41st Iowa, 52;

Greve vs. First Div. St. Paul and Pacific R. Company, 26th Minnesota, 66;

C. and A. R. R. Co. vs. Goodwin et al., 111th Illinois, pp. 273, 282, 283, and cases cited;

Ellis vs. Rock Island and M. C. R. Company (Illinois), 17 North Eastern Reporter, 62;

Preston vs. Sabine and E. T. R'y Company (Texas), 7th South Western Reporter, 825;

Louisville, New Orleans &c. R. R. Company vs. Dickson, 63rd Mississippi, 380;

Canton, 30th Maryland, 354;

Railroad Co. vs. Railroad Co., 7th Pacific Rep., 123;

Hendry vs. Railroad Co., 24th Amer. and Eng. R. Cas., 287;

Wayner vs. Railroad Co., 22nd Ohio State, 576;

Hyde vs. Mayor of Manchester, 5th De G. and Sm., 249;

Martin vs. London, etc., Railroad Co., L. R. 1st Eq., 145.

It is said by Chief Justice Stayton, in delivering the Opinion of the Court, in the case of Preston et al. vs. Sabine and E. T. R'y Company, supra:

"The question as to the right of a land-owner, when a railroad has been constructed on his land without his consent, or without first in some way acquiring the right to the railroad, or the material that enters into its structure, has arisen in may cases; in some of which it arose in deter-

mining the elements of damages the land-owner was entitled to have considered in proceedings instituted to condemn the right of way subsequently to the construction of the road. The manner in which the question has arisen, cannot, however, affect the question of right or title to the material used in the construction of the road. If, when placed on land without right, it becomes the property of the land-owner, it can no more be taken from him, and applied to a public use without compensation, than can the land on which it is placed. The question was considered by the Court of Appeals of this State in the case of Railroad Company vs. Hays, 5th Texas Law Review, 771; and it held that a railway constructed on land without right to do so did not become the property of the land-owner. The reasoning of the court in that case seems to us correct, and in accordance with the great weight of authority."

And it is said by Chief Justice Bicknell, in delivering the Opinion of the Court in the case of Jones vs. New Orleans and Selmee R. B. Company, supra:

"The duty rested upon the appellee, before the taking and appropriating of the lands, to have caused, in the appointed mode, an ascertainment of the compensation to which the owner was entitled, and to have made payment of the compensation, neglecting this duty, the entry upon and possession of the lands was wrongful; no title to them was acquired, and the title of the owner was not divested.

"The neglect of the duty, the wrongful entry and possession does not preclude the appellee from resorting subsequently to appropriate proceedings for the acquisition of the lands, and of consequence, availing itself of all the structures it may have placed thereon.

"Though the appellee was a trespasser by reason of the neglect to pursue the proper remedy for acquiring the

lands—acquiring them without the consent of the owner—there is in the right continuing in him to pursue the remedy, rendering the possession rightful, and by which the title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser the proprietor can keep the lands, and keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser by which he may acquire the use and enjoyment of or title to the lands. *There is also another distinguishing fact, the structures of the appellee were dedicated not to the use and enjoyment of the freeholder, but to public uses.* These elements of the case distinguish it from that of the trespasser entering upon lands, fixing chattels to the freehold for its use and enjoyment, which he must intend to convert into realty, and which following the title to the soil as one of its incidents, passes to the proprietor."

Equally expressive is the language of Mr. Justice Agnew, who delivered the Opinion of the Court in the case of Justice vs. Nesquehoning Valley R. R. Company, supra :

" *It is true, the entry was a trespass by reason of the omission to do an act required for the security of the citizen, to-wit : to make compensation or to give security for it. For this injury the citizen is entitled to redress. But this redress cannot extend beyond his injury. It cannot extend to taking the improvements of the company. They are not his, and cannot increase his remedy. The injury was to what the land-holder had himself, not what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him ? In the case of a common trespasser, the owner of the land may take and keep his structures nolens volens ; but not so in this case, for though the original entry was a trespass, it is well settled that the company can proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structure laid thereon.*"

The object of this proceeding is to award *just* compensation to the owner of the land, within both the letter and spirit of the Constitutional Limitation, "that private property shall not be taken or damaged, for public or private use, without *just* compensation."

Garrison vs. City of New York, 21st Wallace, 204, 295;

Article II, Section XV, of the Constitution of the State of Colorado.

The *just* compensation in this constitutional provision required is for the injury which the owner may sustain for the taking of the land belonging to him at the time he is deprived of it.

Greve vs. First Div. St. Paul and Pacific R. Co. 26th Minnesota, supra;

Lyon and Wife vs. The Green Bay and Minnesota R'y Company, 42nd Wisconsin, supra;

Kennedy vs. The M. and St. P. R. R. Co., supra.

When this is afforded, the purposes of right and justice, and the requirements of the constitution and the statute are satisfied.

Dawson's Colorado Code, p. 74, et seq.

It is not intended nor required that compensation shall extend beyond the loss and injury sustained, and include that property which the owner had not when the land was taken but which is an incident of the appropriation, and essential to the use for which the law confers the right to retain the property upon paying just compensation for that which has been taken, the amount of which is to be

determined and fixed in this proceeding.

Garrison vs. City of New York, 21st Wallace, 204.

It is true, that in most of the foregoing cases the right to exercise the power of eminent domain had been delegated to the companies and was possessed but not exercised by them at the time the lands were wrongfully taken: And much reliance is placed upon the difference, in this respect, between those cases and the one in hand, by the plaintiff in error.

But it will be found, as is thought, that there is nothing in this reliance, either upon principle or authority;—that it is quite immaterial when the authority is delegated, only so that it exists in the party who took the land and made the improvements thereon in good faith under claim and color of title or for a public use and purpose, when it is sought to be exercised by such party.

North Hudson County R. R. Company vs. Booraem, 28th New Jersey Equity, 450;

The Springfield and Illinois South-eastern Railway Company vs. Hall, 67th Illinois, 99;

Garrison vs. City of New York; 21st Wallace, 203-205;

Baltimore & Susquehanna Railroad Company vs. Nesbitt, 10th Howard (U. S.), 395;

Hampton vs. The Commonwealth, 19th Pennsylvania, 329;

The Commonwealth vs. Beatty, 1st Watts, 382;

Yost's Report, 17h Pennsylvania, 524;

Fenlon's Petition, 7th Pennsylvania, 173;

Mills on Eminent Domain, Sec. 93, and cases cited.

The case of the North Hudson County R. R. Company vs. Booraem, supra, is one well in point upon this proposition; for the reason, that the Company, having exhausted it power of eminent domain, delegated to it in its original charter, by one exercise of it, as held in that state and many others, (Morris R. R. vs. Central R. R., 31st N. J. L. 205;

Little Miama R. R. vs. Naylor, 2nd Ohio State, 235;

Atkinson vs. Marietta R. R. 15th Ohio State, 21;

Duck River R. R. Co. Cochrane, 3rd Lea (Tenn.), 478;

Cummins vs. Des Moins R'y, 63rd Iowa, 397;

Baltimore R. R. vs. P. W. and K. R. R., 17th W Va., 812;

Lodge vs. Philadelphia R. R., 8th Phila., 345;

Brigham vs. Agricultural Branch R. R., 1st Allen, 316;

Kenton County Court vs. Turnpike Co., 10th Bush, 529;

Hudson Canal Co. vs. New York R. R., 9th Paige, 323;

Mills on Eminent Domain, Sec. 58, and cases cited),

it constructed, upon a line and route wholly different from

that theretofore condemned and operated by it, and without any power to further condemn lands for its use, an inclined plain road by which the assent and descent of a hill was made easy, and much distance saved, at an expense of many thousand dollars, but without purchasing the land upon which it was constructed, or in any way becoming rightfully possessed of it. Subsequently to the making of these improvements an Act of the Legislature was passed, delegating to the Company the power to condemn the land upon which these improvements had been thus made; and in the proceeding thereunder, subsequently taken to acquire the title and determine the proper measure of compensation, it was held, that the improvements formed no part nor element of such compensation; —where no part of the property taken by the company or lost by the owner through the taking, and, therefore, that the landowner could not have the benefit of their value in the estimate of the value of the land upon which they were placed for a public purpose.

And this holding would seem to be consistent with reason; because it is difficult to understand what greater rights in property can be acquired by one who has the power but does not exercise it, than by one who has not the power at the time, but acquires it before it is exercised by either, the possession of both being without legal right, but for a public use and purpose, and especially where, as in this case, the possession of the one without the power of condemnation was rightful under color and claim of title made in good faith.

All lands are held subject to a superior right in the Government to take them at any time for public uses, rendering just compensation therefor.

The right of eminent domain always existed at common

law. The time and manner of its exercise may have been prescribed by statute, but the right itself was superior to any statute or constitution.

Kohl vs. United States, 91st United States, 376;

City of East St. Louis vs. St. John, 47th Illinois, 465;

Mills on Eminent Domain, Secs. 48, 84, 85, and cases cited;

Cooley on Constitutional Limitations (2nd ed.), pp. 524, 526, 536, 547, and cases cited.

In legal contemplation, there is contained in every grant by the Government the condition, that the land granted may be retaken by it or its agents whenever required for public purposes. It is only the residue of the property, title or interest in the land that is susceptible of ownership.

Why, then, may not this reserved right and power of the Government be legitimately transferred to one who is technically a trespasser upon the lands, using them for the public uses to which they are about legally to be devoted, but equitably an owner of the improvements made by him thereon, whereby, in the exercise thereof, he may legally acquire such interest of the land-owner, and, acquiring that, preserve and retain his own equitable property?

The technical trespass;--the prior occupation without authority of law would not preclude the School District from taking subsequent measures when authorized by law to condemn the land for its use.

Secombe vs. Railroad Company, 23rd Wallace, 108, 118, and cases cited to main point.

But it is contended by plaintiff in error, that if this construction obtains, he will thereby be deprived of the use, benefit and enjoyment of his property during the time it was so wrongfully held: And this supposed result is urged with earnestness as a reason why he should be allowed the value of the improvements as compensation for this supposed loss.

It is believed that this contention is a perfect *non sequitur.*

If the statute furnishing the method of appropriating private property for public use and ascertaining the measure of just compensation to be paid therefor, when applied to a case like this, only furnishes a partial remedy, there is a remedy for the remainder at common law.

Mills on Eminent Domain, Sec. 88, and cases cited;

Troy vs. Cheshire R. R., 23rd New Hampshire, 83;

Burlington R. R. vs. Reinhackle, 15th Nebraska, 279.

"If the 'School District' occupied the land before condemnation without the consent of the owner, and without any law authorizing it, 'it is' liable in trespass to the person who owned the land at the time."

Secombe vs. Railroad Company, 23rd Wallace, 118;

66th Pennsylvania State, 409; 39th New York, 171.

It is not supposed to be necessary to compare and contrast the equities of this School District with those of a Railroad Company, and demonstrate how much superior the former are to the latter; for the reason that authority, precedent and justice are sufficiently broad and comprehensive to secure to either that which equitably is its own.

This School District is a Municipal Corporation;—a municipal division of the State Government;—a part of that sovereignty to which the power of eminent domain is reserved, and in which it rests and abides.

School District vs. Gage, 39th Michigan, 484;

Wilder vs. State, 4th South Western Reporter, 657.

"Land may be appropriated for the erection of a school-house and for a school-yard. The use proposed is not local and limited, but public. Schools are a public necessity, and as taxation for such schools is supported, the exercise of eminent domain is equally justified in providing suitable locations. The use need not be universal. The practice of condemnation for this purpose exists without question in many of the states."

Mills on Eminent Domain, Sec. 17, and cases cited;

Township Board vs. Hackman, 48th Missouri, 243;

Williams vs. School District, 33rd Vermont, 271;

Peckham vs. School District, 7th R. I., 545;

Appointment of Viewers, Wyoming Common Pleas, 4th Leg. Gaz., 410;

Long vs. Fuller, 68th Pennsylvaina, 170.

It is difficult to understand what division of government or corporate body could more legitimately and appropriately exercise this power of eminent domain for educational purposes than the School District itself, or what equitable rights should be more carefully and tenderly guarded, preserved, cultivated and encouraged than its, existing, as they do, purely for the public good.

All of which is respectfully submitted by

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